Supreme Court, U.S.
FILED
JAN 10 2007
OFFICE OF THE CLERK

No. 06-___ 06-971

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

PHILLIP ACUFF, CHARLES W. BROWN, WILLIAM CARLISLE, JAMES M. CARPENTER, LAMAR CLARK, C.H. COBB, WILLIAM R. JOHNSTON, DAN C. JONES, CLYTHUS MASON, JOHNNY W. MITCHELL, YORK SIT, and CHARLES R. WARREN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

Of Counsel

GLENN F. BECKHAM
LONNIE D. BAILEY
UPSHAW, WILLIAMS, BIGGERS, BECKHAM & RIDDICK, LLP
Post Office Drawer 8230
Greenwood, MS 38935-8230
(662) 455-1613

* Counsel of Record

PAUL A. CUNNINGHAM *
GERALD P. NORTON
SIMON A. STEEL
HARKINS CUNNINGHAM LLP
1700 K Street NW
Suite 400
Washington, DC 20006-3804
(202) 973-7600

Attorneys for Petitioner, Illinois Central Railroad Company

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. When an employee covered by the Federal Employers' Liability Act ("FELA") settles a claim for occupational injury against an employer, does Section 5 of FELA, 45 U.S.C. § 55, impose special restrictions on the freedom of the parties to include in the settlement a release of other potential occupational injury claims, or do "the releases of [FELA] employees stand on the same basis as the releases of others," as this Court stated in *Callen v. Pennsylvania Railroad*, 332 U.S. 625, 630 (1948)?

2. If Section 5 of FELA does impose special restrictions on such releases, as the Mississippi Supreme Court held, which among the various competing standards adopted by the federal courts of appeals and state appellate courts, or other possible standards, governs the validity of those releases?*

---

* ICRR presents, through the undersigned counsel, the same questions, in a petition for review of a similar decision of the Mississippi Supreme Court, in *Illinois Central Railroad v. McDaniel,* No. 06-763, *petition for cert. filed,* No. 06-763 (U.S. Nov. 29, 2006). ICRR addresses the similarities and differences between the two cases at various points throughout this petition, and offers a suggestion as to how the Court might handle the two cases together in Part IV of the argument below.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court below were Illinois Central Railroad Company ("ICRR"), petitioner herein, and Phillip Acuff, Charles W. Brown, William Carlisle, James M. Carpenter, Lamar Clark, C.H. Cobb, William R. Johnston, Dan C. Jones, Clythus Mason, Johnny W. Mitchell, York Sit, and Charles R. Warren, respondents herein. ICRR is not seeking review of those portions of the judgment below that relate only to Hubert Deer, Charles E. McNeil, Lester Ray Warren, Willie Woodberry, and James Expose.

RULE 29.6 STATEMENT

Petitioner is a wholly owned subsidiary of Illinois Central Corporation, which is a wholly owned subsidiary of Grand Trunk Corporation, which is a wholly owned subsidiary of Canadian National Railway Company, a publicly held corporation. No other publicly held corporation owns more than 10% of ICRR's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
STATUTES OR OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Statutory Background	9
B. Factual Background	11
C. Proceedings in the Court Below	12
REASONS FOR GRANTING THE PETITION	13
I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT ESTABLISHING THE VALIDITY OF GENERAL RELEASES IN FELA SETTLEMENTS	14
II. THE DECISION BELOW EXACERBATES A MATURE AND ACKNOWLEDGED CONFLICT AMONG FEDERAL COURTS OF APPEAL AND STATE APPELLATE COURTS CONCERNING THE VALIDITY OF FELA RELEASES	16
A. The "Known Claim for a Specific Injury" Test	16
B. The Basic "Known Risk" Test	17

TABLE OF CONTENTS—Continued

Page

C. The Fact-Intensive "Specifically Known Risk" Test 19

III. THIS COURT'S REVIEW IS NECESSARY TO RESTORE UNIFORMITY AND PREDICTABILITY TO THIS IMPORTANT AREA OF FEDERAL LAW 23

IV. ICRR RESPECTFULLY SUGGESTS THAT THIS CASE AND *MCDANIEL* SHOULD BE ADDRESSED, AND HEARD, TOGETHER ... 25

CONCLUSION 26

Appendix A 1a

Appendix B 32a

Appendix C 33a

Appendix D 36a

Appendix E 54a

TABLE OF AUTHORITIES

CASES Page

Am. Dredging Co. v. Miller, 510 U.S. 443 (1994). 9
Anderson v. A.C. & S., Inc., 797 N.E.2d 537 (Ohio Ct. App. 2003), *appeal not allowed*, 804 N.E.2d 40 (Ohio 2004), *cert. denied*, 543 U.S. 926 (2004) 17
Aswad v. Norfolk S. Ry., No. 04-2536, 2006 WL 1063297 (Va. Cir. Ct. Apr. 18, 2006) 18
Babbitt v. Norfolk & W. Ry., 104 F.3d 89 (6th Cir. 1997) ..... *passim*
Boyd v. Grand Trunk W. R.R., 338 U.S. 263 (1949) 10
Callen v. Pa. R.R., 332 U.S. 625 (1948) ..... *passim*
Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952) .. 7, 10, 23
Duncan v. Thompson, 315 U.S. 1 (1942) 13
Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 7
Ill. Cent. R.R. v. McDaniel, No. 2005-CA-00389-SCT, 2006 WL 2506739 (Miss. Aug. 31, 2006), *petition for cert. filed*, No. 06-763 (U.S. Nov. 29, 2006) ..... *passim*
Knoth v. Ill. Cent. R.R., No. 2005-CA-001882-MR, 2006 WL 1510782 (Ky. Ct. App. June 2, 2006) 17
Loyal v. Norfolk S. Corp., 507 S.E.2d 499 (Ga. Ct. App. 1998) 18, 23
McElhenny v. Ill. Cent. R.R., Civ. No. 2002-495 (Cir. Ct. Holmes Cty., Miss., Nov. 17, 2006), *motion for clarification filed* (Cir. Ct. Holmes Cty., Miss. Dec. 12, 2006) 13
Norfolk S. Ry. v. Sorrell, No. 05-746 (U.S. Jan. 10, 2007) 9
Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998) 20

TABLE OF AUTHORITIES—Continued

Page

Rogers v. Mo. Pac. R.R., 352 U.S. 500 (1957)..... 9
Sea-Land Serv., Inc. v. Sellan, 231 F.3d 848 (11th Cir. 2000) 6, 10, 18, 21
S. Buffalo Ry. v. Ahern, 344 U.S. 367 (1953)..... 7
Stephens v. Ala. State Docks Terminal Ry., 723 So. 2d 83 (Ala. Civ. App. 1998)..... 17
Urie v. Thompson, 337 U.S. 163 (1949)..... 10
Wicker v. Consol. Rail Corp., 142 F.3d 690 (3d Cir. 1998), *cert. denied*, 525 U.S. 1012 (1998).. *passim*

STATUTES

Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 *et seq.*)..... *passim*
28 U.S.C. § 1257 2
28 U.S.C. § 1445(a)..... 10
45 U.S.C. § 51 10
45 U.S.C. § 55 ..... *passim*
45 U.S.C. § 56 10

LEGISLATIVE HISTORY

H.R. Rep. No. 60-1386 (1908) 7, 10
S. Rep. No. 60-460 (1908)..... 9

COURT RULES

SUP. CT. R. 10(b) 7
SUP. CT. R. 10(c)..... 7

SCHOLARLY AUTHORITIES

Bebchuk, L. & Posner, R., *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006) 22

TABLE OF AUTHORITIES—Continued

Page

CARROLL, STEPHEN J. ET AL., ASBESTOS LITIGATION (RAND Institute for Civil Justice 2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf 24

Symposium, *"Boilerplate": Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006) ... 22

IN THE

Supreme Court of the United States

No. 06-___

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

PHILLIP ACUFF, CHARLES W. BROWN, WILLIAM CARLISLE, JAMES M. CARPENTER, LAMAR CLARK, C.H. COBB, WILLIAM R. JOHNSTON, DAN C. JONES, CLYTHUS MASON, JOHNNY W. MITCHELL, YORK SIT, and CHARLES R. WARREN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

Petitioner Illinois Central Railroad Company respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court.

OPINIONS AND ORDERS BELOW

The opinion of the Mississippi Supreme Court (Pet. App. 1a-31a) is not yet reported in Southern Reporter, Second Series, but is available from Westlaw at 2006 WL 2168122. The trial court's judgment (Pet. App. 33a-35a) and the transcript containing its bench ruling in support of that order (Pet. App. 36a-53a) are unreported.

JURISDICTION

The judgment of the Mississippi Supreme Court for which review is sought was entered on August 3, 2006. Pet. App. 1a-31a. The Mississippi Supreme Court denied a timely petition for rehearing on October 12, 2006. Pet. App. 32a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES OR OTHER PROVISIONS INVOLVED

This case concerns Section 5 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 55, which is reproduced in the Appendix (Pet. App. 54a).

STATEMENT OF THE CASE

In the late 1980s and early 1990s respondents, then all employees of ICRR, settled various occupational injury claims against ICRR. As part of their settlements, they each signed a broad release, all but one of which expressly listed as released several types of potential future as well as existing occupational injury claims against ICRR. Included among the claims listed in each case was "asbestos." In the decision below, the Mississippi Supreme Court acknowledged that asbestos claims could have been contemplated when the respondents signed their releases. Pet. App. 22a, ¶ 51.[1]

---

[1] The claims released in respondents' initial settlements varied, as do some of the terms included in their releases. The Carpenter release covers "all claims, losses, damages, injuries or diseases" arising from alleged exposure to asbestos or other identified environmental hazards. Pet. App. 15a-16a, ¶ 38. Similarly, most respondents, whose initial claims were for hearing loss, expressly released all hearing loss claims and other non-pending claims for occupational disease-type illness, including claims based on exposure to asbestos and several other identified occupational exposures. Pet. App. 15a, ¶ 37. The Cobb release even more broadly covers "all claims, demands, grievances, and causes of action of any nature." Pet. App. 16a, ¶ 39.

The Mississippi Supreme Court did not find dispositive the variations in either the underlying claims or in the terms of the releases settling those

Some ten or so years later, respondents joined with others as plaintiffs in a large multi-plaintiff action filed in Mississippi state court under FELA, alleging injury as a result of workplace exposure to asbestos.[2] In 2002 and in 2004, before trial, ICRR agreed with the plaintiffs in that action on a binding settlement procedure, which provided for payments conditioned on the provision by plaintiffs of certain documentation regarding their employment, medical history, and claimed injury. Pet. App. 2a-3a, 6a, ¶¶ 2, 13. In the agreements, ICRR expressly reserved the right to refuse payment on several grounds, including prior release. *See* Pet. App. 10a-11a, ¶¶ 23, 25.

Respondents sought payments under the agreements, but ICRR declined to pay them because of their release of asbestos-related claims in the prior releases. Respondents then moved to compel payments under the 2002 and 2004 agreements. The trial court ruled for respondents, Pet. App. 33a-35a, and ICRR appealed to the Mississippi Supreme Court, which affirmed, Pet. App. 1a-31a. That court held that the releases were invalid under Section 5 of FELA, which prohibits contractual "exemptions" from FELA liability of rail and maritime employers for injuries to their employees. Pet. App. 14a-22a, ¶¶ 36-51. The court deemed the releases invalid "exemptions," rather than valid releases, after reviewing two conflicting standards for making that distinction derived from prior federal court of appeals decisions—a Sixth Circuit rule that the Mississippi Supreme Court (in common with several other courts) read as requiring "a known claim

---

claims. In fact, each release unambiguously encompassed potential asbestos-related occupational injury claims—most, by expressly including asbestosis as a specified risk in their enumeration of released claims; the Cobb release, by broadly covering "all" potential claims "of any nature" without exceptions. Pet. App. 16a, ¶ 39.

[2] *Eakins v. Ill. Cent. R.R.*, Civ. No. 2001-65 (Cir. Ct. Jefferson Cty., Miss.) ("*Eakins*").

for a specific injury" as a predicate for a valid release, *Babbitt v. Norfolk & W. Ry.*, 104 F.3d 89, 93 (6th Cir. 1997), and a Third Circuit rule that only potential claims for "specifically known risks" can be validly released, and only subject to complex and onerous additional requirements which must be determined by a "very fact-intensive process," *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 701 (3d Cir. 1998), *cert. denied*, 525 U.S. 1012 (1998). Pet. App. 18a-21a, ¶¶ 44-48. In contrast to the prior decision by a different panel of the Mississippi Supreme Court in another case, *Illinois Central Railroad v. McDaniel*, 2006 WL 2506739 (Miss. Aug. 31, 2006), *petition for cert. filed*, No. 06-763 (U.S. Nov. 29, 2006), which endorsed both *Babbitt* and *Wicker*, the panel in this case endorsed *Wicker*, but rejected *Babbitt* (Pet. App. 20a, ¶ 47).

The Mississippi Supreme Court recognized that "fraud or mutual mistake may be required to invalidate a release covering the particular injury being settled." Pet. App. 18a, ¶ 43 (citing *Callen v. Pa. R.R.*, 332 U.S. 625 (1948)). However, it held that under Section 5 of FELA, a prior release constitutes an invalid "exemption" as applied to a new alleged injury that was not a "specifically known risk," as defined by *Wicker*, at the time of the release, even when the injury was of a type expressly included in the release and even when the risk of that type of injury was within the general contemplation of the parties at the time of the release. Pet. App. 20l-21a, ¶¶ 47-48. The Mississippi Supreme Court cited no provision of Section 5 nor any language in this Court's decisions to support that conclusion.

The court's conclusion was based in part on the premise that when the respondents signed their releases they did not have any pending asbestos "claims" against ICRR. Pet. App. 16a, ¶ 40. The Mississippi courts did *not* deny that the releases plainly and expressly encompass potential or inchoate

subsequent claims for asbestos-related disease, and did *not* find that respondents were unaware of the risk of contracting asbestos-related disease. Indeed, all but one of the releases specifically identify asbestos-related disease as a risk for which potential claims were released.[3]

Rather, the Mississippi Supreme Court joined the Third Circuit in *Wicker* in holding that FELA subjects releases of employees' claims "to a higher standard" than applies "[u]nder general contract." Pet. App. 21a, ¶ 49. It also endorsed *Wicker*'s requirement that a release spell out the "quantity, location and duration of potential risks." Pet. App. 20a-21a, ¶ 48.[4]

The decision below conflicts with this Court's precedent. In *Callen*, this Court explained that FELA's prohibition against "exemptions" from FELA liability does not apply to "releases" of liability, because a release "is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." 332 U.S. at 631. *Callen* held that FELA releases are subject to the "same" law as other releases, and thus are valid, absent fraud or mutual mistake. *Id.* at 630.

In the present case, the Mississippi Supreme Court expressly acknowledged that the provisions it deemed invalid under Section 5 of FELA were "releases." Pet. App. 14a-16a, 22a, ¶¶ 36-40, 51. It identified no finding of fraud or mutual mistake. Nor did it identify any plausible public policy or equitable grounds for distinguishing *Callen*. It did not rule

---

[3] As detailed above, all but one of the releases expressly include asbestos-related disease in their enumeration of risks for which potential claims were being released. The exception, the Cobb release, is the most broadly phrased of all, and plainly also encompasses potential asbestos-related disease claims. *See* note 1, *supra*.

[4] The court also noted that when the plaintiffs in *Wicker* signed their releases, they had been "unaware of their injuries and the cause thereof," Pet. App. 21a, ¶ 49.

that the releases were not sufficiently clear and specific in their inclusion of claims for injuries related to asbestos exposure, and did not rule them to be ambiguous. Moreover, the alleged asbestos exposure occurred prior to the negotiation of the releases.

In this case (and in *McDaniel*), the Mississippi Supreme Court joined multiple other appellate courts in a series of recent rulings that have supplanted *Callen*'s clear "release"/"exemption" distinction with a variety of complex and conflicting restrictions on what releases, in what circumstances, will be acknowledged as valid releases rather than being deemed invalid "exemptions." Moreover, there is now a mature and acknowledged three-way split in the federal courts of appeals, with appellate courts in multiple states similarly divided, concerning when an express release of FELA claims is not a release, but instead an invalid "exemption."

First, the Sixth Circuit in *Babbitt* stated its "known claim" standard, which some courts have since read as applicable to releases contained in agreements that settle occupational injury claims. As noted, the Mississippi Supreme Court, without explanation, endorsed *Babbitt* in *McDaniel* but rejected it in this case. *Second*, the Third Circuit expressly declined in *Wicker* (with which the Mississippi Supreme Court in this case agreed (Pet. App. 20a-21a, ¶¶ 47-49)) to adopt the "known claim" standard, instead allowing releases of "specifically known risks," subject to additional onerous and complex requirements. *Third*, the Eleventh Circuit has adopted a less onerous rule, which requires only that released potential claims be for "known risks," without any further requirements. *Sea-Land Serv., Inc. v. Sellan*, 231 F.3d 848, 852 (11th Cir. 2000).

These different rules yield materially different results. Respondents did not have a "known claim for a specific [asbestos-related] injury," as the Sixth Circuit rule would

require, when they signed their releases, and the Mississippi Supreme Court also concluded that the "fact-intensive" inquiry mandated by the Third Circuit supported invalidation of the releases. But the releases plainly met the requirements of the Eleventh Circuit's test: asbestos-related injury was certainly a "known risk," which all but one of the releases specifically covered on their face (and the exception covered it by its inclusiveness).

The decision below thus meets two of this Court's established criteria for review. It conflicts with this Court's precedent, *see* SUP. CT. R. 10(c), and it also implicates and exacerbates a mature and complex division of authority among several federal courts of appeal and state courts of last resort, SUP. CT. R. 10(b).

The statutory context and practical implications of the decision below and those upon which it relied also militate in favor of review. This Court has historically been vigilant to resolve conflicts under FELA because "uniform application" of the statute "throughout the country [is] essential to effectuate its purposes." *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 361 (1952).[5] This acknowledged need for uniformity is accentuated by FELA's liberal venue rules, which create opportunities for forum-shopping among state and federal courts if they apply different rules. Moreover, as this

---

[5] *See also S. Buffalo Ry. v. Ahern*, 344 U.S. 367, 370 (1953) (Congress "intended" FELA to be a "uniform scheme"); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942) ("[FELA] requires uniform interpretation"). Congress also addressed the importance of uniformity, with an explanation that still has force a century later:

> A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.

H.R. Rep. No. 60-1386, at 3 (1908).

case, *McDaniel,* and the prior federal court of appeals cases cited above demonstrate, the questions presented are important and recurring ones.

Uniform and clear rules are especially important in the practical context of *settlements* of FELA claims. By restoring the simple and clear *Callen* rule that validates "releases" while invalidating only "exemptions," this Court could forestall litigation seeking the judicial rewriting of thousands of settlements of FELA claims that have been entered into voluntarily in reliance on that rule. In doing so, this Court could at the same time assure railroads, other employers subject to FELA, and their employees that future settlements voluntarily entered into will be honored in accordance with their express and specific terms. Restoring *Callen* would thus facilitate and encourage the prompt and just settlement of FELA disputes, including asbestos claims that would otherwise clog the courts.

By contrast, if the Court allows the morass of competing standards for judicially invalidating releases of FELA claims to remain, new settlements will be discouraged; comprehensive settlements will be replaced with piecemeal settlements, if any; employers subject to FELA may hesitate to compensate claimants until their injuries are fully "known" or their risks are "specifically known"; old settlements will be relitigated; and forum-shopping and disputes over the application of "fact-intensive" judicially created standards for the invalidation of settlement terms will generate further litigation and transaction costs.

Accordingly, this Court should grant review so as to reestablish a clear, uniform rule governing the validity of releases in FELA settlements. ICRR invites the Court to reaffirm the rule of *Callen*, and to make clear that FELA releases are not subject to any limits beyond those applicable to all other releases. Alternatively, if the Court believes that additional limitations beyond *Callen*'s are required under

Section 5 of FELA, it should take this opportunity to resolve the circuit split by providing an authoritative articulation of those limitations, on which parties can rely in settling asbestos and other occupational exposure claims under FELA, and on which parties and the courts can rely in assessing efficiently and reliably whether such claims have been validly released.

A. Statutory Background

In 1908 Congress enacted FELA because it "was dissatisfied with the common-law duty of the master to his servant." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 507 (1957). The traditional common law rules made it difficult for railroad workers to recover for injuries sustained on the job, and the various states applied inconsistent tort law rules. Accordingly, FELA modified the common law of the states and established a uniform national standard. For example, the Act abolished certain common-law defenses, and, in Section 5, sought to prevent employers subject to FELA from "exempting" themselves out of liability to their employees through contracts. *See* S. Rep. No. 60-460, at 2-3 (1908).[6] Thus, FELA provides, under federal law, remedies that in most other industries are matters of state workers' compensation law, with no right to seek a remedy in court. FELA now applies not only to railroad employees but to seamen and longshoremen across the country.[7]

Section 5 states that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to *exempt itself from any liability*

---

[6] As this Court recently observed, however, FELA's "remedial purpose" does not require that "every uncertainty in the Act [be interpreted] in favor of employees." *Norfolk S. Ry. v. Sorrell*, No. 05-746, slip op. at 13 (U.S. Jan. 10, 2007).

[7] *E.g., Am. Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994).

created by this chapter, shall *to that extent* be void." 45 U.S.C. § 55 (emphasis added).[8] Federal law governs the validity of releases under FELA. *Dice*, 342 U.S. at 361. The party attacking a release bears the burden of showing that specific provisions of the release are invalid. *Callen*, 332 U.S. at 629-30. Section 5 was not aimed at negotiated settlements of litigation or pre-litigation claims or potential claims, and it did not address the traditional policy in favor of such settlements. Instead, it was enacted to foreclose an anticipated practice whereby railroads might insist that their employees "discharg[e] the company from liability for personal injuries" as a condition of employment. H.R. Rep. 60-1386, at 6 (1908). Section 5 was "designed to protect railroad workers and seamen from overreaching *as a condition of either obtaining or maintaining employment,*" and is not violated in the absence of such overreaching. *Sea-Land,* 231 F.3d at 851 (emphasis added).

Many FELA claims are brought and litigated in state court, as here, because while FELA claims may be brought in state court, *see* 45 U.S.C. § 56, they are generally not removable, 28 U.S.C. § 1445(a). The plaintiff in a FELA case often has a range of federal and state courts in which to sue.[9] However,

---

[8] Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie v. Thompson*, 337 U.S. 163, 174 (1949).

[9] The multi-state nature of employment covered by FELA means that employees may sue in federal or state courts in several states. Under FELA's liberal venue rules, plaintiffs may sue in any jurisdiction where the railroad operates. 45 U.S.C. § 56; *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263, 265 (1949). ICRR and its affiliates currently operate in 16 states in eight circuits: the First, Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh. These include the three circuits that have adopted

the same substantive federal law governs FELA claims in federal and state court.

B. Factual Background

This case arises out of complaints based on personal injuries allegedly sustained by respondents as a result of their exposure to asbestos while employees of ICRR. Most respondents had made prior claims against ICRR for occupational injury. These prior claims were settled with payments by ICRR and execution of releases by respondents in the late 1980s and early 1990s. As the Mississippi Supreme Court acknowledged, for all but one respondent[10] the releases expressly covered future injury claims for exposure to a variety of occupational hazards, including asbestos. Pet. App. 15a-16a, ¶¶ 37-39. Relevant language from the releases is set forth in that court's opinion. Pet. App. 15a-16a, ¶¶ 37-39.

In 2001, respondents became plaintiffs in *Eakins*, a large multi-plaintiff case filed against ICRR under FELA in state court, alleging that they had sustained asbestos-related conditions from exposure while working for ICRR. ICRR entered into an agreement establishing a settlement procedure in the *Eakins* case. The procedure provided for substantial payments to each plaintiff, on the conditions that they produced specified information and were not subject to certain defenses, including prior release. When ICRR declined to make the settlement payments to certain plaintiffs in *Eakins*, including respondents, on the ground of prior release, they filed a motion in the Mississippi trial court to enforce the agreement. *See* Pet. App. 2a-3a, ¶¶ 2-3.

As to the prior release issue, respondents asserted that their releases were invalid because, when they signed their

---

divergent positions on the questions presented. Other railroads also operate in multiple circuits and states.

[10] *See* note 1, *supra* (respondent Cobb).

releases, they had not been aware that they had claims for the occupational exposure identified in the releases they had signed and provided to ICRR. The trial court held that the releases executed by respondents did not bar their recovery under the *Eakins* settlement procedure. Pet. App. 33a-35a, 45a-47a; *see id.* at 3a-4a, ¶¶ 3-7. The court made no finding of any fraud by ICRR or mutual mistake.

C. Proceedings in the Court Below

From the judgment in *Eakins*, ICRR appealed to the Mississippi Supreme Court and challenged the trial court's judgment in favor of respondents on the release issue (and rulings for respondents and other plaintiffs on other issues not involved here).

The Mississippi Supreme Court rejected what it understood to be the Sixth Circuit's "known claim" test in *Babbitt*. Pet. App. 20a, ¶ 47. The decision endorsed the Third Circuit's "specifically known risk" test in *Wicker*, which had also rejected *Babbitt*'s "known claim" test. The Mississippi Supreme Court agreed with *Wicker*'s observation that the issue entails a "'fact-intensive process.'" Pet. App. 22a, ¶ 50 (quoting *Wicker*, 142 F.3d at 701). It observed that *Wicker* had "criticized" the "'laundry list/boilerplate'" type of release, Pet. App. 22a, ¶ 51, and, characterizing respondents' releases here as of that type, upheld the trial court's failure to find that, despite the explicit language of those releases, potential asbestos claims were contemplated by the respondents (Pet. App. 22a, ¶ 51). The opinion did not identify or suggest any fraud by ICRR in securing the releases, or any mutual mistake.[11]

---

[11] In a parallel litigation the same trial court had made similar rulings. ICRR's appeal in that case was heard by a different panel of the Mississippi Supreme Court in *Illinois Central Railroad v. McDaniel*, which endorsed the "known claim" test derived from *Babbitt*, as well as the fact-

REASONS FOR GRANTING THE PETITION

"[T]he scope of § 5 is of fundamental importance in the administration of [FELA]." *Duncan v. Thompson*, 315 U.S. 1, 5 (1942). The decision below directly conflicts with this Court's precedent applying Section 5 to FELA settlement agreements, and exacerbates an already mature and acknowledged conflict in both the federal circuits and state appellate courts. This Court's review is necessary to clarify the validity of a general release, made as part of an agreement settling FELA claims, in the absence of any fraud or mutual mistake. In *Callen*, this Court held that such a release does not offend FELA's prohibition against liability "exemptions," and is enforceable on the "same" basis as other releases, without any limitations as to "known claims" or "specifically known risks." ICRR respectfully urges the Court to reaffirm that holding, from which the decision below and other recent decisions have strayed.

The question presented is important not only to the many FELA cases brought in state and federal court each year, but also to the far larger volume of FELA claims that are resolved by negotiation and agreement and do not end up in court. Settlements provide compensation promptly, fairly, and efficiently by voluntarily allocating risks in circumstances of uncertainty. Allowing railroads, other employers subject to FELA, and their employees to enter into fully enforceable

---

intensive "specifically known risk" test of *Wicker*. 2006 WL 2506739, at *7-*9 (Miss. Aug. 31, 2006). ICRR filed a petition for certiorari in *McDaniel* on November 29, 2006 (No. 06-763). A similar issue has arisen in other litigation, where a Mississippi trial court recently ruled, citing the Mississippi Supreme Court's decision in this case, that a prior explicit release of claims associated with asbestos exposure, negotiated in connection with an injury unrelated to asbestos exposure, is not a bar to a later claim for asbestos-related injury. *McElhenny v. Ill. Cent. R.R.*, Civ. No. 2002-495 (Cir. Ct. Holmes Cty., Miss. Nov. 17, 2006), *motion for clarification filed* (Cir. Ct. Holmes Cty., Miss. Dec. 12, 2006).

settlements before risks, injuries, and/or claims are fully "known" is consistent with FELA's goals of fair compensation for alleged workplace injuries. By invalidating the releases in this case, the state supreme court has called into question thousands of FELA settlements reached with employees that include the release of future asbestos or other occupational hazard claims, and it has injected substantial uncertainty into the settlement process. In sum, this Court's review of the questions presented here is warranted.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT ESTABLISHING THE VALIDITY OF GENERAL RELEASES IN FELA SETTLEMENTS.

More than a half century ago, this Court established the validity of general releases under Section 5 of FELA for future, unaccrued causes of action. In *Callen*, the Court explained that a general release of future claims executed after an alleged wrongful act is committed does not offend FELA's prohibition of liability exemptions. 332 U.S. at 630-31. In the decision below, the Mississippi Supreme Court misconstrued *Callen*.

In *Callen*, the plaintiff-employee sustained a back injury while working and entered into a settlement agreement with the employer-railroad. *Id.* at 626-27. For cash received the plaintiff executed a general release—in what could fairly be described as "boilerplate" terms—of his claims arising out of the accident that caused the back injury (for "'all claims and demands which [plaintiff] ha[s] or can or may have against [the railroad]'"). *Id.* at 626. Significantly, at the time the plaintiff executed the general release, he had not been diagnosed with, and was unaware that he had sustained, a permanent back injury. *Id.* at 627.

Subsequently, when the plaintiff sought damages under FELA for a severe and permanent back injury, this Court

upheld the general release as a bar to that claim. In rejecting the plaintiff's argument that the release violated Section 5 of FELA, the Court stated:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 631. Moreover, the Court explained that "until the *Congress* changes the statutory plan, the *releases of railroad employees stand on the same basis as the releases of others.*" *Id.* at 630 (emphasis added). The fact that the employee did not know he had a permanent back injury was irrelevant to the validity of the release. Hence *Callen* makes clear that, where there is an injury claim, and a bona fide compromise of that claim—including a release of future claims known or unknown—the release is valid under FELA, absent fraud or mutual mistake.

Here, most of the respondents had made specific claims for damages arising from hazards to which they had been exposed on the job. With one exception,[12] the express terms of their releases specifically identified asbestos-related disease as a risk to which they were releasing present and future claims. For significant consideration, they then executed a bona fide compromise of their claims, which included an express release of claims concerning asbestos exposure. There has been no finding that the releases were in any way fraudulent or based on any mutual mistake. The ruling below is, therefore, irreconcilable with *Callen*, and should be reviewed by this Court.

---

[12] As noted above, the exception, respondent Cobb's release, was also amply broad to encompass potential asbestos-related claims. *See* note 1, *supra*.

II. THE DECISION BELOW EXACERBATES A MATURE AND ACKNOWLEDGED CONFLICT AMONG FEDERAL COURTS OF APPEAL AND STATE APPELLATE COURTS CONCERNING THE VALIDITY OF FELA RELEASES.

The ruling below also merits this Court's review for an independent but related reason. It exacerbates a well-developed conflict among the various lower appellate courts that have abandoned this Court's bright-line distinction between "releases" and "exemptions" in *Callen*, and that have then proceeded to articulate various inconsistent criteria for when a release will be deemed a prohibited "exemption." These decisions have splintered in at least three different directions.

A. The "Known Claim for a Specific Injury" Test

In *Babbitt*, the Sixth Circuit addressed a release by a railroad employee who accepted a "buy-out" or severance from the company. 104 F.3d at 90. The plaintiff-employee signed an agreement releasing the railroad from any and all claims the employee may have had against the company, known and unknown. Subsequently, the employee brought a FELA claim for hearing loss. *Id.*

The Sixth Circuit stated a bright-line rule for upholding releases under Section 5 of FELA: "[t]o be valid, a release must reflect a bargained-for settlement of a *known claim for a specific injury*, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Id.* at 93 (emphasis added). In reversing summary judgment that had been granted to the railroad by the court below in light of the release in the severance agreement that was before it, the Sixth Circuit did not go so far as to mandate that, even if there is a settlement of a known claim that provides a sufficient predicate for a release, the scope of the release must

be limited to known claims for specific injuries. However, subsequent cases, including the decision below, have read *Babbitt* as stating a bright-line rule that not only requires a known claim as a *predicate* for a release, but also limits the *scope* of releases to known claims. This bright-line rule directly conflicts with *Callen* by severely limiting the scope of liability releases that can be contained in agreements to settle existing or potential FELA claims.

In the present case, the Mississippi Supreme Court rejected *Babbitt* and its "known claim" test, Pet. App. 20a, ¶ 47, while relying on the concededly different test adopted by the Third Circuit in *Wicker, see id.* Other appellate courts have, however, followed *Babbitt* and applied its "known claim" test to occupational injury settlement agreements. *E.g.*, *Stephens v. Ala. State Docks Terminal Ry.*, 723 So. 2d 83, 86-87 (Ala. Civ. App. 1998) (relying on *Babbitt* in finding that a post-injury general release does not apply to a new injury or aggravation of an old injury); *Anderson v. A.C. & S., Inc.*, 797 N.E.2d 537, 540, 543-44 (Ohio Ct. App. 2003) (relying on *Babbitt* to hold that release of liability for known asbestosis did not extend to mesothelioma that subsequently developed as a result of plaintiff's exposure to asbestos, even though specifically identified in release), *appeal not allowed,* 804 N.E.2d 40 (Ohio 2004), *cert. denied,* 543 U.S. 926 (2004); *Knoth v. Ill. Cent. R.R.*, No. 2005-CA-001882-MR, 2006 WL 1510782, at *1 (Ky. Ct. App. June 2, 2006) (applying *Babbitt* "known claim" rule); *McDaniel,* 2006 WL 2506739, at *7-*9, ¶¶ 27-29 (purporting to apply both *Babbitt* "known claim" test and *Wicker* version of "known risk" test).

B. The Basic "Known Risk" Test

Other appellate courts have expressly rejected the "known claim" rule, beginning with the Third Circuit in *Wicker.* Although *Wicker* led the way with its "known risk" test, we first address the simpler "known risk" test later propounded by the Eleventh Circuit before discussing the more complex

and onerous "specifically known risk" test adopted in *Wicker*, a variant of which was applied in the decision below.

In *Sea-Land,* the Eleventh Circuit upheld a post-injury settlement release given by a seaman under FELA. The court refused to apply the *Babbitt* test, and instead applied the basic "known risk" criterion articulated by the Third Circuit in *Wicker*, but without the additional evidentiary requirements imposed by the Third Circuit and on which the Mississippi Supreme Court relied in the present case. The Eleventh Circuit held:

> "a release does not violate § 5 [of FELA] provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed."

Sea-Land, 231 F.3d at 852 (quoting *Wicker,* 142 F.3d at 701).

The Mississippi Supreme Court's decision in the present case plainly conflicts with that standard, since asbestos-related risks indisputably were "known" at the time of the releases: they were expressly included in all but one of the releases. *See* notes 1, 3, *supra.* Other courts have, however, joined the Eleventh Circuit in applying the "known risk" test without additional onerous requirements. *E.g., Loyal v. Norfolk S. Corp.*, 507 S.E.2d 499, 503-04 (Ga. Ct. App. 1998) (broad awareness within the railroad industry of the risk at issue, with cases "legion all over the country" when release was signed); *see also Aswad v. Norfolk S. Ry.*, No. 04-2536, 2006 WL 1063297, at *17, *19 (Va. Cir. Ct. Apr. 18, 2006) (rejecting *Babbitt* and following *Wicker*'s "known risk" standard "as modified by" *Loyal* to recognize that risk may be "known," and liability relating to that risk may validly be released, without risk being specifically identified in release; requiring proof that plaintiff was unaware of and could not "foresee" risk of silicosis to invalidate general release given with respect to subsequent silicosis claim).

C. The Fact-Intensive "Specifically Known Risk" Test

In *Wicker*, plaintiff-employees, who had previously signed general releases as part of injury claim settlements, brought suits alleging claims for new injuries. The Third Circuit observed that "the proper application and reach of § 5 remains unclear," 142 F.3d at 698, noting that "lower courts that have addressed this issue have disagreed on the proper interpretation of § 5," *id.* at 699. It stated that, "[a]lthough the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts." *Id.* at 698.

The *Wicker* court did not succeed in clarifying the issue. At the same time as it created a circuit split by rejecting the Sixth Circuit's rule, the Third Circuit promulgated a complex rule of its own mandating a "fact-intensive process" of inquiry in order to determine whether a settlement agreement that involves no fraud, mutual mistake or offense to public policy should be enforced in accordance with its express terms. *Id.* at 701.

Wicker held that a FELA plaintiff may release future claims that cover "specifically known risks" even if "there is no present manifestation of injury," explaining that, "[w]hile the elusiveness of any such determination might counsel in favor of a bright-line rule such as the Sixth Circuit adopted in *Babbitt*, we decline to adopt one here." *Id.* The Third Circuit explained that the Sixth Circuit's rule was inimical to the interests of both employee and employer. It reasoned:

> [I]t is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather

> than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury.

Id. at 700-01.

As a result, the Third Circuit held that a release does not violate Section 5 "provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those *risks* which are *known* to the parties at the time the release is signed." *Id.* at 701 (emphasis added).

However, citing no statutory basis in Section 5 or elsewhere, the Court of Appeals went on, as if acting as a legislature or regulatory agency, to add an extensive "proviso" about the enforceability of a FELA release. *Id.* The Third Circuit specified that a FELA release should "chronicle" the scope and duration of known risks by "spell[ing] out the quantity, location and duration of potential risks to which the employee has been exposed." *Id.* Yet, even such detailed specificity, with the burdens it imposes on an employer, would at best only provide the employer "strong evidence" in support of a release defense. *Id.* Thus, the *Wicker* standard virtually assures that a measure intended to avoid litigation will itself invite disputes and require litigation to be effective. There is no indication that this is what Congress intended in Section 5[13] or what this Court intended in *Callen*. Indeed, the Third Circuit acknowledged that the *Wicker* standard, which the Mississippi Supreme Court endorsed here, is a "more difficult . . . standard for railroad employers than is typical in non-FELA situations." *Id.* Yet it made no attempt to recon-

---

[13] If Congress had wanted to do more to regulate FELA releases, as *Wicker* does, it could easily have done so, as it has with respect to releases under other employment laws, by imposing further limitations in FELA. *E.g.*, *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) (federal statute imposed specific limits on waiver of claims by employees).

cile that more restrictive standard with this Court's ruling in *Callen* that, unless Congress amends FELA, releases of railroad employees "*stand on the same basis as the releases of others*." 332 U.S. at 630 (emphasis added).

The Third Circuit also commented with disfavor that the releases at issue in *Wicker* involved "boilerplate" provisions including a "laundry list" of known risks to which the railroad employees may have been exposed. In endorsing *Wicker*'s "legislative" ruling, the decision below relies heavily on its language disparaging "boilerplate" and "laundry lists," *i.e.*, general releases that specifically identify and list as released multiple known risks associated with the workplace to which the employee may have been exposed. Pet. App. 19a-20a, 22a, ¶¶ 46, 51.

Whether absolute or presumptive, this prohibition on general releases of FELA claims is highly significant and troublesome. *Sea-Land* upheld a "general release," 231 F.3d at 850, and this Court in *Callen* upheld a release of "'all claims and demands which I have or can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained by me' at the time and place involved in the suit," 332 U.S. at 626-27. Indeed, most of the releases in the present case are in some respects less "general" than those in *Callen* and *Sea-Land*, insofar as they enumerate a list of particular risks, including the risk of disease due to asbestos exposure, rather than purporting to encompass unidentified occupational injury risks. Moreover, general releases serve important practical functions that limited piecemeal releases cannot fulfill. By proposing a "standard" or "form" draft release that lists multiple particular risks, the employer alerts employees to known risks that are apparent to the employer based on its past experience and

knowledge of the workplace.[14] The use of standard or "boilerplate" language also fosters efficiency and consistency in contracts, including the settlement of recurring actual and potential occupational claims. *See generally, e.g.*, Symposium, *"Boilerplate": Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006).[15] This is particularly important with FELA, under which federal and state courts, rather than any administrative agency, are responsible for resolving workplace injury claims by rail and other employees covered by FELA.

Most importantly, general releases enable the parties to achieve a comprehensive settlement of claims, whereas piecemeal releases have less value in avoiding future litigation because they leave open the potential for unresolved claims and for litigation regarding the scope of the claims resolved. Because general releases are more valuable to actual or potential defendants than piecemeal releases, they may result in more compensation for claimants. *See Wicker*, 142 F.3d at 695 (finding that employees who sign general releases tend to receive larger settlements, and that employers are willing to

---

[14] Here there was no claim that respondents did not have the opportunity to take issue with the terms of the releases, including its recitals. Nor is there any claim that ICRR refused to consider changes to proposed "boilerplate" language, which contained a useful and informative list specifically identifying known risks to which the employee was or may have been exposed, even if the employee may not previously have been aware of it. Indeed, the variations in language among the releases at issue in this case demonstrate that ICRR did agree to releases on various different sets of terms where appropriate. Moreover, here there has been no claim that respondents were not aware of the risk of asbestos-related disease due to exposure to asbestos. *See* note 16, *infra*.

[15] Loose use of the vague term "boilerplate," which can have varied meanings in different contexts, obscures significant differences. But even seemingly "one-sided" contracts can have justifications that are in the public interest. *E.g.*, L. Bebchuk & R. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

pay higher sums to settle claims under a general release). Settlements for general releases can also encompass and provide prompt compensation for uncertain and future claims without making the parties wait until all the details of an injury or risk are fully known. *See Loyal*, 507 S.E.2d at 502 ("Clearly, in an industry, such as the railroad industry, that has a number of known occupational risks and diseases, it is important to both the employer and employee to be able to settle potential claims regarding injuries or diseases prior to actual discovery.").

Given these virtues of general releases, it is counter-productive for the "specifically known risk" test to insist that a release "spell[] out the quantity, location and duration of potential risks to which the employee has been exposed." 142 F.3d at 701; *see also* Pet. App. 20a-21a, ¶ 48. Such insistence effectively mandates discovery as part of a settlement proposal, and invites follow-on litigation about the sufficiency and accuracy of the detailed disclosures it requires.

III. THIS COURT'S REVIEW IS NECESSARY TO RESTORE UNIFORMITY AND PREDICTABILITY TO THIS IMPORTANT AREA OF FEDERAL LAW.

It is antithetical to the "uniformity" mandate of FELA to federal and state courts (*Dice*, 342 U.S. at 361) for conflicting rulings in the lower courts on recurring issues to be left unresolved. For FELA's uniform federal law to be upheld, this Court must continue to be vigilant to address inconsistencies among the various federal and state courts from among which FELA's liberal venue rules allow plaintiffs to choose.

Uniformity is especially important with respect to contractual issues, such as the validity of releases of FELA claims. Railroads and other FELA employers will become increasingly reluctant to settle claims if they are unsure of which of a variety of differing, "fact-intensive" and complex

standards will govern efforts to enforce even clear and unambiguous comprehensive settlements, especially when some of those standards prevent the parties from freely and knowingly allocating risks until after highly detailed information about the extent of injuries or risks is established.

If settlement is deterred, and if settlements become subject to relitigation in light of uncertain standards governing their validity, everyone will suffer.[16] Employers will face heightened litigation risks and costs, employees will be unable to obtain prompt and efficient compensation by settlement, nor as much compensation, and the courts may face a deluge of new asbestos and other occupational injury cases. The inevitable result will be wasteful litigation. As of the end of 2002, about 58% of the $70 billion spent by American businesses on asbestos litigation had gone to transaction costs rather than to plaintiffs. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION (RAND Institute for Civil Justice 2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf. Legal uncertainty that discourages and impairs the effectiveness of settlements can only serve to increase that percentage. As this Court recognized in *Callen,* a clear rule that upholds unambiguous settlements in the absence of fraud or mutual mistake is as necessary in this context as in other contexts, and Congress has not provided otherwise.

---

[16] There is a substantial inventory of releases negotiated in the 1990s or earlier that would not likely have anticipated the novel requirements of *Babbitt* or *Wicker*. However, at the time of such releases asbestos had been well known for years as one of the risks to which railroad employees are often exposed, as FELA claims based on exposure to asbestos were already common by then. *E.g., In re FELA Asbestos Cases*, 646 F. Supp. 610 (W.D. Va. 1985); *Schweitzer v. Consol. Rail Corp.*, 36 B.R. 469 (E.D. Pa. 1984), *rev'd*, 758 F.2d 936 (3d Cir. 1985); *Ex parte Edwards*, 460 So. 2d 855 (Ala. 1984).

The present case, and the almost simultaneous decision in *McDaniel*, exemplify and exacerbate the lack of such needed clarity in the lower courts today. In *McDaniel,* the Mississippi Supreme Court purported to endorse as "compelling" both a "known claim" rule and a "known risk" standard, despite the fact that the "known risk" standard arose from case law expressly rejecting the "known claim" rule. In both *McDaniel* and the present case, it adopted the Third Circuit's complex and onerous "specifically known risk" variant of the "known risk" standard. *McDaniel*, 2006 WL 2506739, at *7-*8, ¶¶ 27-29; Pet. App. 19a-22a, ¶¶ 46-51.

The disarray in the federal and state courts on this important issue under FELA stems from a disregard of *Callen.* There is no statutory basis for the draconian restrictions on the freedom to settle current and even specifically identified potential occupational injury claims imposed by *Babbitt, Wicker*, *McDaniel* and the decision below, and these cases ignore *Callen*'s instruction that releases of FELA claims are to be treated consistently with releases of "other" types of claim.

Given the mature and acknowledged splits in the circuits and among the states, the fundamental importance of Section 5, and the destructive effects of uncertainty upon efficient settlement of mounting asbestos-related and other FELA claims, this Court should act now to bring clarity and closure to the standards that apply to releases under FELA.

IV. ICRR RESPECTFULLY SUGGESTS THAT THIS CASE AND *MCDANIEL* SHOULD BE ADDRESSED, AND HEARD, TOGETHER

As noted above (*supra*, at i n.*), and as anticipated in ICRR's petition in *McDaniel,* No. 06-763 (Pet. at 11 n.8), this case presents the same questions, upon review of a decision by the same court, as *McDaniel.* ICRR believes that in both cases the Court should grant the petition for certiorari, reaffirm, consistent with *Callen*, that Section 5 of FELA imposes

no special restrictions on the validity of general releases of FELA claims, and reverse the decision of the Mississippi Supreme Court. ICRR therefore respectfully suggests that the Court consider the two petitions in tandem.

The Court could grant certiorari in one case and hold the other petition, with a view to granting, vacating and reversing in the latter case if it rules for ICRR in the former. There are, however, some differences between the two cases. They involve four different forms of release (three in this case and one in *McDaniel*), and two different appellate opinions, with somewhat different reasoning. Reviewing the cases together could provide the Court a richer context in which to consider and resolve the questions presented than either would separately. ICRR therefore respectfully suggests that the Court grant certiorari in both *McDaniel* and *Acuff*, with a view to scheduling them for a consolidated argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel

GLENN F. BECKHAM
LONNIE D. BAILEY
UPSHAW, WILLIAMS, BIGGERS, BECKHAM & RIDDICK, LLP
Post Office Drawer 8230
Greenwood, MS 38935-8230
(662) 455-1613

PAUL A. CUNNINGHAM *
GERALD P. NORTON
SIMON A. STEEL
HARKINS CUNNINGHAM LLP
1700 K Street NW
Suite 400
Washington, DC 20006-3804
(202) 973-7600

Attorneys for Petitioner, Illinois Central Railroad Company

* Counsel of Record

January 10, 2007

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2005-CA-00388-SCT

ILLINOIS CENTRAL RAILROAD COMPANY

v.

PHILLIP ACUFF, CHARLES W. BROWN, WILLIAM CARLISLE, JAMES M. CARPENTER, LAMAR CLARK, C. H. COBB, HUBERT DEER, WILLIAM R. JOHNSTON, DAN C. JONES, CLYTHUS MASON, CHARLIE E. MCNEIL, JOHNNY W. MITCHELL, YORK SIT, CHARLES R. WARREN, LESTER RAY WARREN, AND WILLIE WOODBERRY

and

JAMES EXPOSE

v.

ILLINOIS CENTRAL RAILROAD COMPANY

DATE OF JUDGMENT:	12/06/2004
TRIAL JUDGE:	HON. LAMAR PICKARD
COURT FROM WHICH APPEALED:	JEFFERSON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	LONNIE D. BAILEY GLENN F. BECKHAM THOMAS R. PETERS EDWARD BLACKMON, JR.
ATTORNEYS FOR APPELLEES:	THOMAS W. BROCK WILLIAM S. GUY
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	AFFIRMED ON DIRECT APPEAL AND CROSS-APPEAL – 08/03/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE WALLER, P.J., EASLEY AND DICKINSON, JJ.

DICKINSON, JUSTICE, FOR THE COURT:

¶1. This appeal and cross-appeal arise from the circuit court's denial of a railroad company's motion to dismiss its employees' asbestos-related injury claims and the court's subsequent order enforcing the settlement agreement between the parties. The railroad argues the circuit court erred by not dismissing the employees' claims based on their submission of false affidavits, the execution of prior releases covering the asbestos-related injury claims, the expiration of the statute of limitations, and the discovery of medical information showing certain employees did not suffer from asbestos-related diseases when they filed their claims. The cross-appeal arises from the circuit court's denial of one plaintiff's asbestos-injury claim based on his execution of a prior release.

BACKGROUND FACTS AND PROCEEDINGS

¶2. This case was originally filed in the Circuit Court of Jefferson County, Mississippi, on April 2, 2001, as *Elbert Eakins, et al. v. Illinois Central Railroad Company* ("*Eakins*"), under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* The employees are 17 of the 175 *Eakins* plaintiffs who allege they contracted diseases as a result of their exposure to asbestos while employed with Illinois Central Railroad Company ("ICRR"). On August 6, 2002, the parties agreed to a Settlement Procedure under which the *Eakins* plaintiffs, including Appellees, would be paid[1] after submitting certain information to ICRR, including the "Illinois Central Pulmonary Questionnaire," employment and healthcare information, and certain medical records. Upon

[1] In light of the Settlement Procedure, the circuit court entered an order of dismissal. All claims that had been settled and released as of the date of the order were dismissed with prejudice. Claims unsettled as of that date were dismissed without prejudice with the circuit court reserving the right to re-docket those claims.

receipt of sufficient documentation, ICRR was to pay each plaintiff a predetermined amount based on the illness attributable to asbestos exposure and employment with ICRR.

¶3. Although ICRR paid a number of claims pursuant to this process, the *Eakins* plaintiffs filed a Motion to Enforce the Settlement Agreement on June 19, 2003, due to a lag in many payments. Soon after, ICRR voiced concerns about the documentation provided by some of the plaintiffs. One plaintiff, Fred Taylor, had submitted inaccurate and incomplete answers to a question about prior litigation in his Pulmonary Questionnaire, and ICRR learned he had been diagnosed with an asbestos-related illness more than three years before *Eakins* was filed. He was later dismissed voluntarily based on ICRR's statute of limitations defense.

¶4. On March 29, 2004, the *Eakins* plaintiffs' counsel offered to provide ICRR with affidavits from all remaining unsettled plaintiffs detailing their involvement in prior asbestos litigation. After ICRR received the supplemental documentation, it discovered that most of the affidavits, including those from the employees here, omitted the affiant's involvement in at least one additional asbestos case. ICRR moved to compel compliance and for related relief.

¶5. Circuit Judge Lamar Pickard conducted hearings on the settlement issues on June 21, August 2, and October 15, 2004. Both ICRR and the employees agreed to have Judge Pickard determine all issues of both law and fact. ICRR asserted the inaccurate affidavits required dismissal of the employees' actions, prior releases barred thirteen employees' asbestos-injury claims,[2] the statute of limitations had run on two employees, and subsequent tests performed on three employees invalidated their claims.

---

[2] The circuit court did dismiss the claim of James Expose based on a prior release which covered his pending asbestos suit. Expose's cross-appeal from this dismissal is discussed *infra*.

¶6. The circuit court ruled the inaccurate information in the affidavits did not prejudice ICRR, and even if the omitted information had been included, that information would not have aided ICRR in any of its defenses. The court also found the prior releases did not bar any of the plaintiffs' claims, the statute of limitations had not run on plaintiffs Hubert Deer and Willie Mobley, and subsequent medical tests did not bar the claims of plaintiffs Charles McNeil, Lester Warren, and Willie Woodberry.

¶7. On December 6, 2004, the circuit court entered an order granting Plaintiffs' Motion to Enforce Settlement Agreement and denying ICRR's Motion to Compel Compliance with March 29, 2004 Agreement and Supplement and to Dismiss Certain Claims. The court also certified the order as a final judgment pursuant to M.R.C.P. 54(b). Based, in part, on newly-discovered evidence allegedly showing the intentional nature of the employees' affidavit omissions, ICRR requested reconsideration of the order. After a hearing, the circuit court denied ICRR's Motion to Reconsider by order dated January 28, 2005.

¶8. ICRR timely filed its notice of appeal and plaintiff James Expose appealed from the dismissal of his claim based on a prior release.

ISSUES ON APPEAL/CROSS-APPEAL

¶9. ICRR presents five issues for this Court's consideration on appeal:

I. Whether the circuit court erred when it granted the plaintiffs' motion to enforce the settlement agreement and failed to dismiss the plaintiffs' claims because of the plaintiffs' submission of false affidavits and sworn Pulmonary Questionnaires.

II. Alternatively, whether the circuit court erred when it refused to reconsider its December 6, 2004, Order based on newly-discovered evidence.

III. Alternatively, whether the circuit court erred when it failed to dismiss the claims of certain plaintiffs who had previously released their claims against ICRR.

IV. Alternatively, whether the circuit court erred when it failed to dismiss the claims of certain plaintiffs that are barred by the three-year FELA statute of limitations.

V. Alternatively, whether the circuit court erred when it failed to dismiss the claims of certain plaintiffs who had medical tests subsequent to their asbestos-screening which demonstrated they suffered no asbestos-related illnesses.

¶10. On cross-appeal, plaintiff James Expose presents one issue for our consideration: Whether the circuit court erred in ruling that his carpal tunnel release, signed while this asbestos claim was pending, also released his asbestos injury claim.

STANDARD OF REVIEW

¶11. In the proceedings below, both ICRR and the employees agreed to have Judge Pickard determine al issues of both law and fact. "'A circuit judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor,' and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." *City of Jackson v. Perry*, 764 So. 2d 373, 376 (Miss. 2000) (quoting *Puckett v. Stuckey*, 633 So. 2d 978, 982 (Miss. 1993)). We may not disturb Judge Pickard's findings unless he was clearly erroneous or abused his discretion. *Howard v. Totalfina E & P USA, Inc.*, 899 So. 2d 882, 888 (Miss. 2005). We employ de novo review for questions of law. *Maldonado v. Kelly*, 768 So. 2d 906, 908 (Miss. 2000).

DISCUSSION

I. Plaintiffs' Motion to Enforce the Settlement Agreement and ICRR's Motion to Dismiss

¶12. ICRR argues the circuit court committed reversible error by granting the plaintiffs' motion to enforce the settlement agreement in light of false affidavits and questionnaires submitted by the plaintiffs. Plaintiffs assert the omissions were inadvertent, inconsequential, and did not prejudice ICRR.

August 2, 2002, Settlement Procedure

¶13. The Settlement Procedure required the *Eakins* plaintiffs to submit information to ICRR for its review before payments could be made. This included the "Illinois Central Pulmonary Questionnaire," a sworn document requesting information on the plaintiff's employment, medical, and litigation history. The "Litigation" section asked about claims filed against ICRR or any asbestos manufacturer. During pre-settlement discussions, the plaintiffs voiced concerns about the questionnaire, but ICRR told them to do the best they could filling out the forms, as "this would be sufficient."

¶14. ICRR's purpose in obtaining the information on the questionnaire was to verify the claimed disease, confirm employment with ICRR, identify statute of limitations issues, and determine any defenses raised by prior releases. At one point, the agreement explained ICRR could raise defenses "as to length of employment, questions regarding prior releases, questions raised regarding the statute of limitations, or other issues not currently envisioned by the parties." When specifically addressing potential defenses, the agreement noted, "where information is developed that a particular plaintiff's case may be barred by reason of a statute of limitations issue, by reason of a prior release, or failure to establish the plaintiff as an employee of [ICRR]," and ICRR could reject such

cases, pending negotiation. The next paragraph repeated these three defenses.

April 22, 2004, Supplemental Agreement

¶15. Many claims were settled pursuant to the Settlement Procedure, but ICRR discovered a problem with some plaintiffs' answers in the "Litigation" section of the questionnaire. Specifically, ICRR learned that Fred Taylor was also a plaintiff in an unreported case, *Cosey v. E. D. Bullard*, and that he had been diagnosed with an asbestos-related disease in 1995.

¶16. When confronted with ICRR's concerns about plaintiffs failing to disclose their involvement in other asbestos lawsuits, plaintiffs' counsel offered to provide affidavits from the remaining plaintiffs concerning their involvement in prior asbestos litigation. This Supplemental Agreement specifically stated, "we will be supplying affidavits from all remaining unpaid *Allen* and *Eakins* plaintiffs regarding all **prior** asbestos litigation. If a plaintiff has been involved in **prior** litigation, we will provide you with any document that we can obtain for your review." (Emphasis added). The affidavits provided to ICRR stated, "I have never been a plaintiff or a claimant in any asbestos suit other than *Eakins v. ICRR*, No. 2001-65, in the Circuit County of Jefferson County, Mississippi and [name of other suit]." After receiving these affidavits, ICRR discovered the Appellees were also plaintiffs in one or both of the following unreported cases against asbestos suppliers or manufacturers: *McNeil v. Dresser Industries, Inc.*, No. 2002-283-CV9 ("*Dresser*"), and *Phillip Acuff v. American Optical Corp., et al.*, No. 2003-159-CV8 ("*American Optical*"). Plain-tiffs assert their failure to mention these cases was inadvertent.

Unintentional Omissions

¶17. At the October 15, 2004, hearing, Judge Pickard ruled that the omission of the two subsequent asbestos suits was

inadvertent and not willful. Judge Pickard was at least partially persuaded by the fact that, even if these cases had been disclosed, such disclosure would not have assisted ICRR in any of its defenses against the plaintiffs.

¶18. Plaintiffs' counsel admitted to the circuit court that he failed to include the *Dresser* and *American Optical* lawsuits, saying, "[i]t was totally inadvertent. It was my fault." Apologizing for the inaccuracies, counsel assured the court that no plaintiff intentionally withheld information from ICRR and admitted that he did not consider *Dresser* and *American Optical* to be relevant under the Supplemental Agreement. Plaintiffs explain in their brief that both *Dresser* and *American Optical* are

> pre-pack bankruptcy cases where in order to file a claim in the bankruptcy, a lawsuit had to be filed. Thus *Dresser* and *American Optical* were both filed as technical requirements in order to file a bankruptcy claim. There was never any active litigation in *Dresser* or *American Optical* as to [the Appellees].

At the hearing, plaintiffs' counsel stated:

> [*American Optical*] and [*Dresser*] were cases filed regarding a settlement procedure and there has been no activity in the case. It was just a filing. One of them I don't think the Defendant answered; they told us they weren't going to answer, but a lawsuit had to be filed. And so, they haven't been active lawsuits, and in spite of what [ICRR] says, the omission from the affidavit was inadvertent and it was not intentional.

¶19. Plaintiffs also argue that *Dresser* and *American Optical* did not have to be disclosed under the terms of the Supplemental Agreement because they were not **prior** litigation, as both *Dresser* and *American Optical* were filed after *Eakins*. Plaintiffs' counsel admitted in the hearing that the poorly drawn affidavits did not specifically state that they

concerned prior litigation, but he claimed the oversight was his fault and not the result of some conspiracy to hide information from ICRR.

¶20. ICRR challenges the assertion that the affidavits were intended only to disclose lawsuits filed before *Eakins* because the affidavits clearly state all claims were being disclosed. Additionally, several affidavits reported cases filed after April 2, 2001, when *Eakins* was filed, such as *Moore v. Garlock*, which was filed in 2002. ICRR also points to corresponding omissions in the questionnaires as evidence of the employees' deception.

¶21. Even if we agreed with ICRR that plaintiffs cannot claim they intended only to provide information on prior asbestos litigation, this possibility does not lead *ipso facto* to the conclusion that the plaintiffs willfully submitted "manifestly false" affidavits. Clearly, plaintiffs' counsel did not consider the *Dresser* and *American Optical* bankruptcy cases to be of concern to ICRR. The record provides no evidence that plaintiffs or their counsel were trying to conceal information from ICRR.

¶22. Additionally, ICRR suggests no motivation for plaintiffs or their counsel to hide plaintiffs' involvement in these cases. We can imagine no possible benefit or advantage gained by purposely omitting these cases, and none is suggested to us by ICRR. Attributing a less sinister motive to the plaintiffs is much more reasonable. The circuit court found that, because the omissions were immaterial and not committed in bad faith, dismissal of the plaintiffs' claims was unwarranted. Given our deferential standard of review of the factual findings of a circuit court sitting without a jury, we cannot say the circuit court abused its discretion in denying ICRR's motion to dismiss.

ICRR's Defenses

¶23. Plaintiffs assert that under the Settlement Procedure, ICRR reserved three defenses: (1) statute of limitations; (2) valid prior release; and (3) lack of employment with ICRR. Arguably, plaintiffs' involvement in prior asbestos litigation could implicate a statute of limitations defense because such involvement might prove an asbestos-related diagnosis outside the applicable three-year limitations period. However, any involvement in litigation filed after April 2, 2001, including the *Dresser* and *American Optical* cases, does not assist ICRR in any of its defenses.

¶24. According to ICRR, the Settlement Procedure did not limit its defenses. In support of this argument, ICRR points to language in the agreement which states that payments will be made absent the three previously mentioned defenses "or other issues not currently envisioned by the parties." ICRR claims that it did not envision the submission of false information by plaintiffs or the possibility of paying dishonest plaintiffs. ICRR argues that information about other asbestos cases is necessary to determine whether a plaintiff settled his claims, and is thus not entitled to further recovery from ICRR, and to identify other parties who may be liable by way of contribution or indemnity for the plaintiff's injuries.

¶25. After a careful reading of the Settlement Agreement, we agree with the plaintiffs that ICRR reserved three defenses: (1) statute of limitations; (2) valid prior release; and (3) lack of employment. While ICRR may raise the issue of false affidavits under the catch-all "other issues not envisioned" language,[3] its asserted reasons for needing information about other asbestos cases was surely envisioned before agreeing to the settlement. Regardless, the two undisclosed

---

[3] In fact, the singular reason the parties entered into the Supplemental Agreement was to address ICRR's concerns about inaccurate information being provided by some plaintiffs in their Pulmonary Questionnaires.

cases have no effect on ICRR's defenses. The cases were filed after *Eakins* (so there is no statute of limitations issue); the cases were pending at the time of the hearing (so there is no possibility of an applicable release); and the cases did not affect any employment determinations. Thus, the circuit court's findings are supported by substantial, credible, and reasonable evidence, and the circuit judge did not abuse his discretion by denying ICRR's motion to dismiss on this ground.

Loss of Confidence and Existence of Prejudice

¶26. The crux of ICRR's argument is its claim that, because of the "willful and systematic" presentation of "manifestly false" affidavits, neither it nor the courts can have confidence in any information provided by the plaintiffs to support their settlement demands. Thus, ICRR asks this Court to void the settlement agreement, reverse the circuit court's judgment, and dismiss the plaintiffs' claims as a sanction.

¶27. ICRR cites two cases where this Court affirmed the dismissal of a plaintiff's case as a sanction for providing false testimony. In *Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990, 991 (Miss. 1999), we affirmed the trial court's sanction of dismissal of the plaintiff's personal injury case where she stated in her interrogatories and deposition that she had never been treated for injuries to her arms, legs, back, or hips prior to the accident at issue. However, Scoggins's medical records revealed that she had been treated for pain or numbness in those areas thirty-five times, diagnosed with widespread arthritis, and undergone a major medical procedure on her back. *Id.* at 992. The trial court did not find Scoggins's excuse of "forgetfulness" to be credible. *Id.* The only issue in the case was damages, and Scoggins's deliberate lies went to the heart of that issue. *Id.* at 994. Sanctions for alleged discovery violations are wholly within the discretion of a trial court, and because we could not say the trial court's findings were manifestly wrong, we affirmed the dismissal. *Id.* at 995.

¶28. In *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385, 1388 (Miss. 1997), the plaintiff willfully concealed the existence of an eyewitness to her injury. We noted that willfulness or bad faith is necessary for the sanction of dismissal, and that dismissal is inappropriate due to attorney neglect. *Id.* at 1389. Because substantial credible evidence supported the trial court's dismissal of Pierce's case based on her "manifestly false" responses, we affirmed the dismissal of her case. *Id.* at 1392.

¶29. As the plaintiffs note, the cases cited by ICRR involved clear, willful misconduct on the part of the client as to a critical issue. Conversely, the circuit judge in the case before us today believed the *Dresser* and *American Optical* cases were inadvertently, rather than willfully, omitted. Additionally, the court found that knowledge of the undisclosed cases could not have helped ICRR. Most importantly, trial courts are given wide latitude in the imposition of sanctions. Given the evidence supporting its decision, we do not find the circuit court abused its discretion by denying ICRR's motion to dismiss on this ground.

II. ICRR'S Motion to Reconsider

¶30. On January 24, 2005, Judge Pickard heard ICRR's motion to reconsider his earlier denial of its motion to dismiss. The focus of the hearing was ICRR's claim that it had "newly discovered evidence" proving the intentional nature of plaintiffs' affidavit omissions.

¶31. ICRR claims that its newly discovered evidence belies plaintiffs' counsel's claim of "inadvertence" in omitting the *Dresser* and *American Optical* cases from the supplemental affidavits. ICRR obtained a "Notice of Disclosure Statement and Chapter 11 Plan Confirmation Hearings and Related Deadlines" from the United States Bankruptcy Court for the Western District of Pennsylvania in the *Dresser* case. According to ICRR, plaintiffs' counsel would have received

this notice prior to April 2004. Additionally, ICRR obtained a sworn statement signed by plaintiffs' counsel and filed in the *Dresser* bankruptcy proceedings which stated, "[t]he undersigned certifies that each creditor named on the attached list has executed an Addendum to Representation Agreement authorizing [plaintiffs' counsel] to represent the creditor in bankruptcy proceedings." According to ICRR, these documents prove plaintiffs' counsel knew of and participated in the *Dresser* case prior to April 2002, when the affidavits were signed and sent to ICRR.

¶32. ICRR's "new evidence" adds nothing. Plaintiffs' counsel never claimed he did not know about the cases. As the circuit court noted, even if the new evidence were to prove plaintiffs and their counsel intentionally left out *Dresser* and *American Optical*, ICRR cannot show how the information would have helped them or how the lack of that information injured them. Thus, ICRR has not shown, and we cannot think of any motivation for plaintiffs to have intentionally misstated these facts. We cannot say the circuit court abused its discretion by denying ICRR's motion to reconsider.

Motion to Compel

¶33. ICRR argues the circuit court erred in refusing to require the plaintiffs to produce all "Addendum[s] to Representation Agreement," which could confirm the plaintiffs' false statements were intentional and "calculated to hide the existence of plaintiffs' involvement" in *Dresser* and *American Optical*. The court denied the motion in part based on the privileged nature of the requested documents. ICRR stretches credibility by claiming the documents fall under the "crime/fraud" exception to the attorney-client privilege.[4] Repeating

[4] The "crime/fraud" exception to the attorney-client privilege applies where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." Miss. R. Evid. 502(d). *See also Hewes v. Langston*, 853 So. 2d 1237, 1246 (Miss. 2003). ICRR

its earlier finding that the information was irrelevant to the disposition of any issues in this case, the circuit court denied ICRR's motion to compel. We agree and find the circuit court did not abuse its discretion in denying ICRR's motion to compel the production of privileged documents.

Further Discovery

¶34. ICRR asked the circuit court to withhold entry of final judgment until it could conduct additional discovery into "the scope of plaintiffs' assault on the integrity and dignity of the judicial process." The court refused to do so. For the previously discussed reasons, the circuit court did not abuse its discretion in denying ICRR's request for further discovery.

Findings of Fact and Conclusions of Law

¶35. ICRR also requested that the circuit court make specific findings of fact and state its conclusions, but the court refused. However, the hearing transcript reveals that Judge Pickard carefully and clearly articulated his factual findings and legal conclusions. This Court has held that where a trial court makes general findings of fact and conclusions of law, it has complied with M.R.C.P. 52. *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So. 2d 359, 367 (Miss. 1992). As the plaintiffs note, Rule 52 is not jurisdictional, and this Court may decide a case if further findings are unnecessary. *Patout v. Patout*, 733 So. 2d 770, 773 (Miss. 1999). Because the record is more than sufficient for appellate review, the circuit court did not abuse its discretion in denying ICRR's request for specific findings of fact and conclusions of law.

III. Prior Releases

¶36. ICRR argues that twelve of the plaintiffs previously released their asbestos-related claims against ICRR by sign-

---

cannot genuinely argue the plaintiffs obtained counsel's services in order to commit perjury or perpetrate a fraud on ICRR with respect to irrelevant information about an asbestos manufacturer's bankruptcy proceedings.

ing prior releases.[5] Ten plaintiffs signed releases in connection with hearing loss claims, plaintiff Carpenter signed a release in connection with an occupational back injury, and plaintiff Cobb executed a release in connection with the release of his seniority rights.[6] The releases were executed in the late 1980's or early 1990's.

The Plaintiffs' Releases

¶37. The releases for hearing loss have three parts. The first part concerns the release of all claims—present and future, known and unknown—arising from any injuries or diseases to the releasee's ears or head resulting in impaired hearing. The second part is relevant to the alleged release of the plaintiffs' current asbestos claims. It states:

> This release specifically excludes any personal injury claim or lien pending against [ICRR], other than for occupational, disease-type illness, or illnesses, to wit, including but not limited to, asbestosis, lead, dust, sand, diesel fumes, paint, PCB, Dioxin, or other toxic or noxious chemical exposure, which claims are specifically released by this document.

The final section is an acknowledgment that the releasee understands the release.

¶38. Plaintiff Carpenter executed a release in connection with the settlement of a back injury claim against ICRR. According to the language of Carpenter's release, it covers:

> all claims, losses, damages, injuries or diseases directly or indirectly caused by or resulting from any alleged

---

[5] The circuit court agreed with ICRR that a thirteenth plaintiff, cross-appellant James Expose, released his asbestos claims in a prior release for carpal tunnel injuries, discussed *infra*.

[6] Although ICRR states that plaintiff Cobb was one of eleven plaintiffs who signed an occupational hearing loss release, the release Cobb actually signed concerned his seniority rights.

> exposure of the undersigned to asbestos, coal dust, sand, silica, welding fumes, brass fumes, diesel fumes, fuel fumes, paint vapors, methylbromide, ammonia gas, lead, PCS, dioxin, or other toxic or noxious chemical exposure and all other fumes, dusts [sic] mists, gases and vapors from any chemical or agent, and in addition, from any and all claims, losses, damages, injuries or diseases directly or indirectly caused by or resulting from the exposure of the undersigned to noise . . . .

Before the signature line, the document states, "THIS IS NOT A RECEIPT FOR WAGES—IT IS A GENERAL RELEASE."

¶39. Plaintiff Cobb signed a release in connection with the release of his seniority rights. According to the release, Cobb agreed to "release and forever discharge [ICRR] from any and all claims, demands, grievances, and causes of action of any nature, kind, character, or description, either at common law or under State or Federal Statute."

¶40. Each plaintiff has provided an affidavit explaining that at the time he signed the release, the only claim he had against ICRR was for hearing loss (or back injury/seniority rights), he did not have a pending asbestos claim against ICRR, he had not been diagnosed with any asbestos-related illness, and he only intended to settle the hearing loss (or back injury/seniority rights) claim. Affidavits have also been provided by C.E. Sorey, II, an attorney who represented Carpenter and nine plaintiffs who signed hearing loss releases. Sorey claims that he had no reason to suspect his clients would develop an asbestos illness in the future, the only injuries discussed in the settlement negotiations were the current ones, and he never intended the release to cover anything other than the current injuries.

Section 5 of the FELA and Relevant Case Law

¶41. The FELA limits the ability of a common carrier (such as ICRR) to fully exempt itself from liability. Section 5 of FELA states, in part "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . ." 45 U.S.C. § 55.

¶42. In *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625, 68 S. Ct. 296, 92 L. Ed. 242 (1948), the United States Supreme Court addressed in dicta the validity of a release under Section 5 of the FELA. Callen claimed that he suffered an occupational back injury. *Id.* at 626. Subsequently, Callen signed a release of all claims he had against the company for personal injuries sustained at the time and place of the injury. *Id.* at 626-27. Unhappy with the $250.00 settlement, Callen sued the company under FELA. *Id.* at 626. According to the Court, "the plaintiff testified that he read and understood the release, knew what he was doing and intended to waive any further claim . . . ." *Id.* at 627. Although the issue before the Court was the accuracy of certain jury instructions, it did note the rule that one who attacks a settlement must show fraud or mutual mistake. *Id.* at 630. The Court also stated that "a release is not a device to exempt from liability but is a means of compromising a claimed liability . . . ." *Id.* at 631. Finally, "[w]here controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." *Id.*

¶43. ICRR argues that *Callen* is completely dispositive of this case, and because the plaintiffs have not proven fraud or mutual mistake, their claims are barred by the prior releases. However, there are numerous factual and legal dissimilarities between *Callen* and this case. *Callen* involved the release of claims for a back injury sustained in an accident specifically discussed in the release, rather than future, unrelated injuries

not known or contemplated by the employee when he executed the release. Here, the plaintiffs' releases, signed more than a decade ago, arose from prior occupational injury claims, not the asbestos-injury claims currently before this Court. While the Supreme Court in *Callen* held that releases are not per se invalid under Section 5 of the FELA, it did include the requirement of a controversy over a "claimed liability." When, if ever, a release may cover future claims is unclear from *Callen*. While proof of fraud or mutual mistake may be required to invalidate a release covering the particular injury being settled (as in *Callen*), one may attack the scope of a prior release and question its effect on future claims pursuant to Section 5 of the FELA.

¶44. Notably, two federal courts of appeals have considered the effect a prior release may have on future claims against an employer, and their decisions are instructive. First, in *Babbitt v. Norfolk & Western Railway Co.*, 104 F.3d 89, 90 (6th Cir. 1997), the United States Court of Appeals for the Sixth Circuit considered claims under FELA that the defendant was responsible for the plaintiffs' hearing loss during the course of their employment. At issue in *Babbitt* was a general release signed by the plaintiffs upon resignation from the railroad. *Id.* The Sixth Circuit distinguished *Callen* on its facts, noting that case involved "a general release freeing the railroad from liability **for the injuries sustained in the accident**," rather than future, unrelated injuries. *Id.* at 92 (emphasis in original). The Sixth Circuit determined:

> where there exists a dispute between an employer and employee with respect to a FELA claim, the parties may release their specific claims as part of an out-of-court settlement without contravening the Act. However, where the release was not executed as part of a specific settlement of FELA claims, 45 U.S.C. § 55 precludes the employer from claiming the release as a bar to liability. **To be valid, a release must reflect a bargained-for settle-ment of a known claim for a specific injury, as**

> **contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him.**

Id. at 93 (emphasis added; citations omitted). Accordingly, "the Release cannot serve as a bar to the Plaintiff's [sic] claims under FELA unless the Release was clearly executed as a settlement for their hearing loss injuries." *Id.*

¶45. In *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 692-93 (3d Cir. 1998), the United States Court of Appeals for the Third Circuit considered the FELA claims of plaintiffs who were exposed to toxic chemicals during their employment with the defendant. Examining the United States Supreme Court's jurisprudence[7] in this area, the court noted that those "decisions have been fact-driven, and consequently do not provide a generally applicable rule of law." *Id.* at 698. However, the court found it clear from these decisions that "[t]o be valid under FELA, a release must at least have been executed as part of a negotiation settling a dispute between an employee and the employer." *Id.* at 700.

¶46. Following this guideline, the Third Circuit declined to adopt the bright line test and rationale advanced by the Sixth Circuit in *Babbitt*. According to the Third Circuit, "it is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement." *Id.* Therefore, the court held:

> a release does not violate § 5 provided it is executed for valid consideration as part of a settlement, and the scope

---

[7] In addition to *Callen*, see *Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263, 70 S. Ct. 26, 94 L. Ed. 55 (1949); *Duncan v. Thompson*, 315 U.S. 1, 62 S. Ct. 422, 86 L. Ed. 575 (1942); *Phila., Balt., & Wash. R.R. v. Schubert*, 224 U.S. 603, 32 S. Ct. 589, 56 L. Ed. 911 (1912); *Mondou v. N.Y., New Haven, & Hartford R.R.*, 223 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327 (1912).

> of the release is limited to those risks which are known to the parties at the time the release is signed. Claims relating to unknown risks do not constitute 'controversies,' and may not be waived under § 5 of FELA.

Id. at 701. Employees must be given the opportunity to make a reasoned decision whether to release an employer from liability for future injuries, and "where a release merely details a laundry list of diseases or hazards, the employee may attack that release as boilerplate, not reflecting his or her intent." *Id.*

¶47. Although the plaintiffs here may prefer *Babbitt*'s bright line rule, both parties actually advocate for our adoption of *Wicker*'s holding and rationale. We believe that *Babbitt*'s rule barring the release of future claims unfairly restricts the ability of an employer and employee to knowingly and voluntarily settle both current and future claims, should the parties so desire. Instead, under the specific language of Section 5 of the FELA and United States Supreme Court precedent, we find the Third Circuit's approach allowing the release of future claims based on specific risks known to the parties to be appropriate.

¶48. Therefore, the key inquiry is whether or not the risk of developing an asbestos-related illness was known and contemplated by each plaintiff at the time he signed his release. In oral argument, ICRR claimed that because "asbestos" was specifically mentioned in the releases, it was a "known risk." Thus, according to ICRR, any hazard may be classified as a known risk simply by listing it in a release. This, of course, does not address the question of whether the employee ever actually contemplated having the illness or injury being released. The releases examined in *Wicker* actually listed exposure "to toxic substances of any kind" among the many risks covered, but the Third Circuit allowed the plaintiffs to proceed with their claims for chemical exposure because the releases purported to settle future claims regardless of

whether the parties knew of and contemplated the potential risks. *Wicker*, 142 F.3d at 702. Clearly, more is required for a risk to be considered "known." The Third Circuit provided valuable guidance as to the scope of a proper release, noting that "a release that spells out the quantity, location and duration of potential risks to which the employee has been exposed" will not violate Section 5 of the FELA. *Id.* at 701.

¶49. Evaluating releases under Section 5 of FELA is undeniably a fact-intensive process, and an assessment of the parties' intent at the time of agreement "is an essential element of this inquiry." *Id.* at 700. ICRR urges us to look only to the language of the release to prove the plaintiffs knew of and appreciated the risk of developing an asbestos-related illness. Under general contract law, parties are usually free to contract away their rights, even those which are unknown and not contemplated. However, releases extinguishing an employee's claims for injuries under FELA are held to a higher standard, given the statutory language and Congress' stated intent in passing the Act.[8] The United States Supreme Court in *Callen* specifically considered testimony by the plaintiff that he "knew what he was doing [when he signed the release] and intended to waive any further claim." 332 U.S. at 627. In *Wicker*, the Third Circuit noted "that a release may be strong, but not conclusive, evidence of the parties' intent." 142 F.3d at 701. In fact, the Third Circuit relied on testimony by the plaintiffs that they were unaware of their injuries and the cause thereof at the time they signed the releases as well as affidavits from the attorneys who represented the plaintiffs when the releases were executed. *Id.* at 695.

---

[8] *See Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958) ("[I]t is clear that the general congressional intent was to provide liberal recovery for injured workers . . . ."); *Boyd*, 338 U.S. at 265 ("'Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies.'") (quoting *Duncan*, 315 U.S. at 6).

¶50. We agree with the Third Circuit's observation "that what is involved is a fact-intensive process, but trial courts are competent to make these kinds of determinations" *Id.* at 701. Here, Judge Pickard, designated by the parties as the finder of fact, considered the relevant statutory and case law, examined the releases, testimony, affidavits, and other evidence before him, and concluded that "in light of the foregoing considerations of fact and law, the court finds that releases executed by the aforementioned plaintiffs does not bar them from participation in the settlement agreement."

¶51. The releases signed by the plaintiffs were the type of "laundry list/boilerplate" documents criticized in *Wicker*. The circuit court could have found the plaintiffs' asbestos claims were contemplated at the time they signed their releases. However, it did not, and we cannot say that Judge Pickard's findings were not supported by substantial, credible, and reasonable evidence. We find the circuit court did not abuse its discretion by denying ICRR's motion to dismiss the claims of the plaintiffs who signed prior releases.

IV. Statute of Limitations

¶52. ICRR argues the claims presented by plaintiffs Deer and Mobley are barred by FELA's statute of limitations, which states, "[n]o action shall be maintained under this chapter unless commenced within three years from the date the cause of action accrued." 45 U.S.C. § 56. In an FELA action, compliance with the statute of limitations is a condition precedent to recovery, rather than an affirmative defense. *Emmons v. S. Pac. Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983). The burden is on the plaintiff to prove that he filed suit within the three-year period. *Id.* at 1118.

¶53. In *Urie v. Thompson*, 337 U.S. 163, 170, 169 S. Ct. 1018, 93 L. Ed. 1282 (1949), the United States Supreme Court held that when an occupational illness is the basis for a claim under FELA, the period of limitations begins to run

when the employee becomes aware of the condition and its potential cause. The Court stated that "when the specific date of injury cannot be determined because an injury results from continual exposure to a harmful condition over a period of time, a plaintiff's cause of action accrues when the injury manifests itself." *Id.* In *Emmons*, the Fifth Circuit held that FELA's limitations period does not run against a claimant who "has no reason to know of his injury when it is sustained," but begins once he "becomes aware that he has been injured and that his injury is work related." 701 F.2d at 1119 (citing *Urie*, 337 U.S. at 170). Notably, a claimant has an affirmative duty to investigate the potential cause of his injury. *Williams v. S. Pac. Transp. Co.*, 813 F. Supp. 1227, 1232 (S.D. Miss. 1992).

¶54. In *Dubose v. Kansas City Southern Railway*, 729 F.2d 1026, 1031 (5th Cir. 1984), the Fifth Circuit addressed the time at which a plaintiff may be charged with an awareness of his injury and its link to his employment or some other cause:

> When a plaintiff may be charged with awareness that his injury is connected to some cause should depend on factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury.

See also Harrison v. United States, 708 F.2d 1023 (5th Cir. 1983) (plaintiff's medical records concealed or lost for several years; physicians' advice negated casual connection); *Aerojet-Gen. Shipyards, Inc. v. O'Keefe*, 413 F.2d 793 (5th Cir. 1969) (several physicians expressly rejected plaintiff's suspicion that his breathing difficulties were caused by his working conditions).

¶55. In *Taurel v. Central Gulf Lines, Inc.*, 947 F.2d 769, 771 (5th Cir. 1991), the plaintiff testified in a deposition that he knew as early as 1980 that his breathing problems might

be asbestos related. In 1978 or 1979, seamen on his ship suggested he might have been exposed to asbestos. *Id.* Taurel also stated that in 1980, a Public Health Service physician told him that his breathing problems might be related to asbestos exposure. *Id.* Taurel was diagnosed in 1987 with asbestosis and filed suit in April 1988 under the Jones Act and general maritime law. *Id.* The FELA three-year statute of limitations, 45 U.S.C. § 56, also governs actions under the Jones Act, 46 U.S.C. § 688.

¶56. In reversing the district court, which had granted summary judgment in favor of the defendant, the Fifth Circuit stated:

> The special master's recommendation rests on Mr. Taurel's deposition testimony that fellow seamen and a doctor told him that exposure to asbestos **might** have caused his condition. Neither of these conversations demonstrates that Mr. Taurel knew, or should have known, that asbestos was more likely responsible for his problems than other potential causes.
>
> The record establishes that no physician diagnosed Mr. Taurel's asbestosis until 1987. **The statements by Mr. Taurel's shipmates in 1978 or 1979 were not medical opinions. Most importantly, from 1975 to 1981, PHS physicians took x-rays of Mr. Taurel's chest four times and concluded each time that his chest was normal. The physician's oral reference to asbestosis in 1980 may have been rank speculation.**

Taurel, 947 F.2d at 771-72 (first emphasis in original; remaining emphasis added).

¶57. Like evaluating the scope of a prior release, determining the date upon which a plaintiff knew or should have known about his illness and its connection to his workplace is a fact-intensive inquiry. Once again, we will not reverse the

factual findings of the circuit court on this issue if they are supported by substantial, credible, and reasonable evidence.

Plaintiff Hubert Deer

¶58. Deer was treated over a period of years by Dr. Walter Boone, a gastroenterologist. In January 1990, Deer visited Dr. Boone with concerns that his shortness of breath was the result of asbestosis. ICRR claims that Deer was aware that his breathing problems might be work-related because he mentioned this thought to Dr. Boone, who noted in the medical record, "Hubert comes in saying that he has been contacted by his lawyer that he may have asbestosis based on increasing amounts of shortness of breath." After an October 1997 visit, Dr. Boone noted in Deer's medical records, "Impression: 1. Exposure to asbestos. 2. Status post peptic ulcer disease. 3. GERD." In a March 1998 entry, Dr. Boone listed the second impression as "Exposure to Asbestos."

¶59. On April 2, 1998, Dr. Robert Middleton diagnosed Deer with asbestos-related lung disease, noting both injury and causation in his report. According to ICRR, Deer knew from prior discussions with Dr. Boone about a possible asbestos-related injury, which placed upon Deer the duty to inquire long before he was diagnosed by Dr. Middleton. ICRR argues that at the very least, Deer should have known about his disease and its relation to his work more than three years before he filed suit on April 2, 2001.

¶60. Deer testified in his deposition that Dr. Boone told him that his shortness of breath was due to the flu. *See Dubose*, 729 F.2d at 1031 (medical advice suggesting an erroneous causal connection delays running of the limitations period). Contrary to ICRR's position, an "impression" of asbestos exposure noted by a gasteroenterologist is hardly enough to begin the statute of limitations. Dr. Boone never evaluated Deer to determine whether or not he actually had an asbestos-related disease, even assuming that as a gastero-

enterologist Dr. Boone would have been qualified to do so. Notably, when Dr. Boone listened to Deer's chest on October 10, 1997, he found that Deer's chest was clear. Deer also points to evaluations by lung specialists in 1991 and 1995 which did not reveal an asbestos-related disease at that time. *See Taurel*, 947 F.2d at 771-72 (regular medical tests excluding asbestosis cannot put plaintiff on notice for purpose of the statute of limitations).

¶61. The circuit court found that Deer was put on notice of his disease on April 2, 1998, so his claim was timely filed. Given the substantial, credible, and reasonable evidence supporting this finding, we find the circuit court did not abuse its discretion by denying ICRR's motion to dismiss Deer's claims based on its statute of limitations defense.

Plaintiff Willie Mobley

¶62. ICRR asserts that as early as November 4, 1996, Mobley was concerned about potential health problems related to asbestos exposure. According to ICRR, Mobley told his doctor that he was a retired railroad worker with a history of asbestos exposure.

¶63. In his deposition, Mobley testified that his doctor, Dr. Jerry Iles, told him that he had emphysema, an assessment recorded in Mobley's medical report. Dr. Iles's deposition supports Mobley's claim that he was diagnosed with emphysema, not an asbestos-related disease. The emphysema diagnosis understandably laid to rest any suspicion Mobley might have had regarding what caused his injury. *See Taurel*, 947 F.2d at 771-72; *Dubose*, 729 F.2d at 1031; He was under no duty to seek out second and third opinions to prove his doctor wrong. Mobley was diagnosed with an asbestos-related disease on April 30, 2001, and he filed suit against ICRR on August 9, 2001, well within the statute of limitations.

¶64. The circuit court found that Mobley's claim was not filed outside the statute of limitations. Because substantial,

credible, and reasonable evidence supports this finding, the court did not abuse its discretion by denying ICRR's motion to dismiss Mobley's claim based on its statute of limitations defense.

V. Subsequent Medical Tests

¶65. The Settlement Procedure listed the information to be provided by the *Eakins* plaintiffs to ICRR. The following language is relevant to this issue:

> In cases of those individuals where the claimed disease process is asbestosis or asbestos-related pleural disease, you will submit an ILO form by a certified B-reader. You will also submit a report from an examining physician identifying the physical findings and establishing a diagnosis. The B-reader and the examining physician may be the same individual.

¶66. ICRR argues that three plaintiffs had medical tests performed after their assessment of an asbestos illness by a B-reader associated with plaintiffs' counsel, and those subsequent tests showed no signs of any asbestos disease. ICRR asserts that because these plaintiffs' personal healthcare providers gave them a "clean bill of health regarding asbestos-related diseases," the plaintiffs are not entitled to any settlement money and are acting in bad faith by pursuing their claims.

¶67. Plaintiff McNeil was initially screened by Dr. Abner Landry, a B-reader associated with plaintiffs' counsel. Dr. Landry read McNeil's chest x-ray on July 23, 2001, as a 1/0, showing the presence of pneumoconiosis. Noting the possible presence of lower lobe soft tissue mass, Dr. Landry recommended that McNeil have a CT scan. McNeil's family doctor arranged for the CT scan, which was conducted on August 17, 2001. The radiologist's report of the scan noted, "[n]o evidence of asbestos related pleural or parenchymal disease seen."

¶68. Six weeks later, Dr. William Pinkston, a pulmonologist associated with plaintiffs' counsel, diagnosed McNeil with pulmonary asbestosis. Dr. Pinkston relied on Dr. Landry's B-read in making the diagnosis. No one told Dr. Pinkston about McNeil's intervening CT scan, which was interpreted as showing no signs of asbestos-related disease.

¶69. Pursuant to the Settlement Procedure, McNeil submitted the following information to ICRR: (1) an ILO form dated 7/23/01 by B-reader Dr. Landry and (2) a report dated 10/4/01 by Dr. Pinkston diagnosing McNeil with asbestosis.

¶70. Plaintiff Warren was initially screened by Dr. James Ballard, a B-reader associated with plaintiffs' counsel. Dr. Ballard read Warren's chest x-ray on April 25, 2001, as a 1/0. Warren's physician, Dr. Bryan Calcote, ordered a follow-up set of chest x-rays on June 22, 2001, to look for asbestos-related disease. The radiologist who read the x-rays noted, "[l]ungs show no evidence of disease."

¶71. On October 5, 2001, Dr. Pinkston evaluated Warren. Relying on Dr. Ballard's B-read report, he diagnosed Warren with pulmonary asbestosis. No one told Dr. Pinkston about Warren's intervening chest x-rays.

¶72. Pursuant to the Settlement Procedure, Warren submitted the following information to ICRR: (1) an ILO form dated 4/25/01 by B-reader Dr. Ballard and (2) a report dated 10/5/01 by Dr. Pinkston diagnosing Warren with pulmonary asbestosis.

¶73. Plaintiff Woodberry was initially screened by Dr. David Dunigan around May 17, 2001. Dr. Pinkston, relying on Dr. Dunigan's report, diagnosed Woodberry with pulmonary asbestosis. Dr. Pinkston was not informed that a chest x-ray performed on Woodberry a week later was "normal" according to the evaluating radiologist and another physician, who noted, "[n]o abnormality is identified in the chest."

¶74. Pursuant to the Settlement Procedure, Woodberry submitted the following information to ICRR: (1) an ILO report dated 5/17/01 by B-reader Dr. Dunigan and (2) a report dated 10/6/01 by Dr. Pinkston diagnosing Woodberry with asbestosis.

¶75. ICRR asserts that Woodberry's claim should be dismissed because his B-reader, Dr. Dunigan, did not submit his report on the proper ILO form, thus failing to satisfy the specific requirements of the Settlement Procedure. This argument is super-technical and meritless. Dr. Dunigan specifically stated in his report, "[a] PA chest radiograph dated March 29, 2001 was evaluated for the presence and classification of asbestos related pneumoconiosis utilizing the 1980 ILO guidelines." Further, the report contained all of the information requested on the ILO form. This argument is without merit.

¶76. ICRR also attacks the credibility of the plaintiffs' B-readers and Dr. Pinkston in an attempt to show "bad faith" on the part of Appellees and their counsel. ICRR discounts Dr. Pinkston's findings because he relied on the B-reads of people he did not know. Also, ICRR points to a study published in a radiology journal that found plaintiff-retained B-readers were more likely to make a 1/0 reading than "blind" readers.

¶77. ICRR's contentions are irrelevant. The Settlement Procedure required an ILO form by a certified B-reader and a report from an examining physician identifying the physical findings and establishing a diagnosis. Each plaintiff complied with these requirements. The agreement did not place restrictions on the B-readers or evaluating physician, and ICRR cannot fault plaintiffs for following the requirements of an agreement it now dislikes.

¶78. Further, the plaintiffs' subsequent medical tests were interpreted by radiologists or family physicians, not certified

B-readers. According to ICRR's own definition, B-readers "are physicians certified by the National Institute for Occupational Safety and Health as proficient in the classification of chest x-rays using the ILO scale." The circuit court noted that "the secondary diagnos[es] [were] not made by a B-reader, someone who has expertise in the matter," as one reason to deny ICRR's motion to dismiss. The plaintiffs also highlight, in detail, the impressive qualifications of Dr. Pinkston, including his twenty years of experience as a practicing pulmonologist and his position on the Attending Staff at the University of Mississippi Medical Center.

¶79. ICRR voluntarily entered into the Settlement Procedure, and the circuit court found that it was bound by that agreement. Given the substantial, credible, and reasonable facts supporting the circuit court's findings, it was not an abuse of discretion to deny ICRR's motion to dismiss the plaintiffs' claims based on subsequent evaluations.

VI. Cross-Appeal: James Expose's Prior Release

¶80. The circuit court dismissed plaintiff Expose's asbestos claim against ICRR because he signed a carpal tunnel release on May 10, 2004, three years after this action was filed. Therefore, his asbestos claim was pending when he signed the release. The release clearly states, "[i]t's further understood and agreed that this is a full and complete release from any and all claims which are known or reasonably could have been known and the damages resulting therefrom, whether for personal injuries or otherwise." The circuit court concluded that because Expose's asbestos claim was pending at the time he signed the carpal tunnel release, he obviously knew the risks of asbestos exposure when he executed the release. Given the substantial, credible, and reasonable evidence supporting the circuit court's decision, we cannot find Judge Pickard abused his discretion in granting ICRR's motion to dismiss Expose's asbestos claims based on the prior release.

CONCLUSION

¶81. For all of these reasons, we affirm the judgment of the circuit court on both direct appeal and cross-appeal.

¶82. AFFIRMED ON DIRECT APPEAL AND CROSS-APPEAL.

SMITH, C.J., WALLER AND COBB, P.JJ., DIAZ, CARLSON AND GRAVES, JJ., CONCUR. EASLEY, J., CONCURS IN PART. RANDOLPH, J., NOT PARTICIPATING.

APPENDIX B

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

Betty W. Sephton
Post Office Box 249
Jackson, Mississippi
39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi
39201-1082

e-mail: sctclerk@mssc.state.ms.us

October 12, 2006

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 12th day of October, 2006.

Supreme Court Case # 2005-CA-00388-SCT
Trial Court Case # 2001-65

Illinois Central Railroad Company v. Phillip Acuff, Charles W. Brown, William Carlisle, James M. Carpenter, Lamar Clark, C. H. Cobb, Hubert Deer, William R. Johnston, Dan C. Jones, Clythus Mason, Charlie E. McNeil, Johnny W. Mitchell, York Sit, Charles R. Warren, Lester Ray Warren, and Willie Woodberry AND James Expose v. Illinois Central Railroad Company

Motion for Rehearing filed by Illinois Central Railroad Company is denied. Randolph, J., not participating.

* NOTICE TO CHANCERY/CIRCUIT/
COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

APPENDIX C

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, MISSISSIPPI

CAUSE NO. 2001-65

ELBERT EAKINS, *et al.*,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

ORDER

THIS CAUSE, having come before this Court for hearing on October 15, 2004, at the Jefferson County Courthouse in Fayette, Mississippi, and the Court having heard and considered the argument of counsel and thoroughly reviewed the briefs submitted by both parties, does hereby find as follows:

1. That, Defendant's Motion to Compel Compliance with the March 29, 2004 Agreement and Supplement to Motion to Dismiss Certain Claims is not well taken and should be overruled; and

2. That, Plaintiffs' Motion to Enforce Settlement should be granted, in part, and denied, in part;

   A. That, based on the facts and controlling law, the prior releases asserted by the Defendant herein, as to the Plaintiffs, Phillip Acuff, Charles W. Brown, William Carlisle, James M. Carpenter, Lamar Clark, C. H. Cobb, William Johnston, Dan C. Jones, Clythus Mason, Johnny W. Mitchell, York Sit, and Charles R. Warren, are invalid as a release of the current asbestos injury claims, and that the Defendant should pay unto these Plaintiffs the

settlement amounts as previously agreed upon by the parties;

B. That, based on the fact and controlled law, the prior release asserted by the Defendant herein as to Plaintiff, James Expose is valid as a release of the current asbestos injury claim, and that the claims of the Plaintiff, James Expose, should be dismissed;

C. That, based on the facts and controlling law, the Three-Year Federal Employers Liability Act statute of limitations had not run prior to the suit filed herein as to Plaintiffs, Hubert Deer and Willie Mobley, and as such the claims of these Plaintiffs should not be dismissed, and that the Defendant should pay unto these Plaintiffs the settlement amounts as previously agreed upon by the parties;

D. That the Defendants claim of medical evidence as to the Plaintiffs, Charlie E. McNeil, Lester R. Warren and Willie Woodberry, should be denied, and as such the claims of these Plaintiffs should not be dismissed, and that the Defendant should pay unto these Plaintiffs, the settlement amounts as previously agreed upon by the parties;

E. That the Defendants claim for failure to establish employment with the Defendant herein through the United States Railroad Retirement Board Records of the Plaintiff, Bernard Banks, should be granted, and that the claims of the Plaintiff, Bernard Banks, should be dismissed.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the Defendant's Motion to Compel Compliance with the March 29, 2004 Agreement and Supplement to Motion to

Dismiss Certain Claims is not well taken and is hereby overruled.

IT IS, THEREFORE, FURTHER, ORDERED AND ADJUDGED, that the Plaintiffs' Motion to Enforce Settlement is granted as to Plaintiffs. Phillip Acuff, Charles W. Brown, William Carlisle, James M. Carpenter, Lamar Clark, C. H. Cobb, William Johnston, Dan C. Jones, Clythus Mason, Johnny W. Mitchell, York Sit, Charles R. Warren, Hubert Deer, Willie Mobley, Charlie E. McNeil, Lester R. Warren and Willie Woodberry, and Defendant should pay unto these Plaintiffs, the settlement amounts as previously agreed on by the parties.

IT IS, THEREFORE, FURTHER, ORDERED AND ADJUDGED, that the Plaintiffs' Motion to Enforce Settlement is denied as to Plaintiffs, James Expose and Bernard Banks, and said Plaintiffs' Claims are hereby dismissed with prejudice.

IT IS, THEREFORE, FURTHER, ORDERED AND ADJUDGED, that pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure, the Court finds that there is no just reason for delay and the Court directs that this is a Final Judgment as to the particular claims adjudged herein.

SO, ORDERED AND ADJUDGED, this the 6th day of December, 2004.

/s/ Lamar Pickard
CIRCUIT JUDGE

A COPY OF SAID ORDER TO BE MAILED VIA U.S. MAIL FROM THE CIRCUIT COURT ADMINISTRATOR TO THE FOLLOWING:

William S. Guy, Esquire
Post Office Box 509
McComb, MS 39649-0509
Attorney of record for the Plaintiffs herein

Glenn F. Beckham, Esquire
Post Office Drawer 8230
Greenwood, MS 38930-8230
Attorney of record for the Defendant herein

APPENDIX D

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, MISSISSIPPI

NO. 2000-100

ROBERT ALLEN, *et al.*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

and

NO. 2001-65

ELBERT EAKINS, *et al.*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

TRANSCRIPT OF THE PROCEEDINGS
HAD ON THE 15TH DAY OF OCTOBER 2004,
BEFORE THE HONORABLE LAMAR PICKARD

APPEARANCES:

THOMAS BROCK, ESQUIRE
WILLIAM GUY, ESQUIRE
GLENN BECKHAM, ESQUIRE
LONNIE BAILEY, ESQUIRE

REPORTED BY: Theresa S. Lumley, CSR
Official Court Reporter
Judicial District
Post Office Box 310
Hazlehurst, Mississippi 39083
(601) 894-3311
theresa.lumley@copiahcounty.org

* * * *

THE COURT: Robert Allen, et al. v. Illinois Central, 2000-100; and Eakins v. Illinois Central, 2001-65.

All right. In these two cases we have a motion to enforce the settlement agreement by the plaintiff, motion to compel compliance with the March 29th, 2004, supplementation to the motion to dismiss certain claims by the defendant.

In January of 2004, the plaintiff filed a motion to enforce the settlement agreement in both of these cases due to irregularities in the documentation of certain claims. Illinois Central Railroad opposed these motions. Rather than proceed with the hearings on the issues, the parties negotiated a supplemental agreement designed to restore Illinois Central Railroad's confidence in the settlement procedures; is that correct?

The plaintiff's counsel agreed to provide Pulmonary Questionnaires on all the remaining plaintiffs by June 1st, 2004, or dismiss the claims. Plaintiff's counsel advised that they would supply an affidavit from each remaining plaintiff in both cases identifying all asbestos litigation involving those plaintiffs; is that correct?

On June 24th of this year, we had a hearing and I opened—reopened the discovery and directed the parties to file briefs in anticipation of a final hearing on the settlement issues. We had a second hearing on all these issues on August 2nd. There was a settlement agreement in place, but eight of the Allen plaintiffs remain unpaid; is that correct?

MR. BROCK: Yes, sir.

THE COURT: And 24 or 25 of the Eakins plaintiffs have not been paid. Illinois Central is refusing to pay these plaintiffs under the settlement agreement for six different reasons, and I'll go over each of these reasons. Is that okay?

All right. The defendant claims that the plaintiffs filed false affidavits so the settlement procedures are so tainted with impropriety that they should be declared void and all remaining claims should be dismissed first. This applies basically to all the plaintiffs except Herbert Gee and Kelly Robinson; is that right?

The defendant claims that the disclosure affidavit submitted by the plaintiffs are false; specifically, 56 of 58 of them are false. They claim that 31 of the remaining 33 plaintiffs in these cases are also plaintiffs in other asbestos cases named McNeil and Acuff. They claim since they was not disclosed, it violates the settlement agreement and these plaintiffs should be dismissed; is that correct?

The plaintiffs argue that the sole purpose of the affidavit was to establish to Illinois Central that none of the remaining unpaid plaintiffs had been involved in asbestos litigation prior to the present cases. The plaintiffs argue that McNeil and Acuff were filed after the cases at bar. They assert that the suits filed after the present cases do not give rise to a limitations defense or any other defense raised by Illinois Central. They claim that the accidental omission of these two cases does not affect settlement agreements; is that correct?

MR. BROCK: Yes.

THE COURT: All right. Your—I think this case will turn on what your supplemental agreement says. If the plaintiffs were only to disclose prior, and I emphasize "prior" participation in asbestos litigation, then I believe that the court should disregard this argument and allow them to recover provided

they have complied with all other aspects of the settlement agreement. If it says to disclose all participation in asbestos litigation, both past and present, then that may be another situation, and I need to determine whether this is such bad faith or a material breach of the agreement that it warrants dismissal of the plaintiffs. I need to know what the supplemental settlement agreement says.

MR. BECKHAM: May I respond, Your Honor? The March 29th, agreement, Your Honor, does not address the affidavit. The affidavits were supplied to us voluntarily by plaintiffs' counsel when we discovered that one of their other plaintiffs, namely Fred Tyler, had an earlier nondisclosed lawsuit that the statute of limitations has run on. The very affidavits themselves say this: "I have never been a plaintiff in any asbestos suit other than"—and then they list a suit; either none, one or two suits; none of which were the two nondisclosed lawsuits.

In response—in our response that is already on file with the court, there is an exhibit, an April 22nd, 2004, letter from plaintiffs' counsel. It says this: "We will supply an affidavit regarding all prior asbestos litigation. If a plaintiff has been involved in prior litigation, we will provide you with any document that we can obtain for your review." Again, the affidavit themselves say, "I have never been a claimant in any suit other than," and then they list suits, none of which were the two lawsuits that we had to discover on our own.

Secondly, the affidavits cannot be construed to mean that they only applied to lawsuits filed after Robert Allen—excuse me, before Robert Allen or Eakins because all of the lawsuits or virtually all of them that were disclosed in these affidavits were, in fact, filed after Robert Allen and Eakins.

MR. BROCK: Good morning, judge. This situation came up, like Mr. Beckham said, about one of the plaintiffs named Fred Tyler. And through medical records, we all found out that he had seen Dr. McArthur and may have had a prior

lawsuit. We don't know. I don't know. To this date I don't know if he was in a prior lawsuit or not back in the '90s, which gave the railroad or would have given the railroad a statute of limitations defense or at least a potential statute of limitations defense. And so in response to that we voluntarily dismissed Mr. Tyler's case, but we undertook voluntarily to assure the railroad that their—that the remaining unpaid plaintiffs weren't involved in some similar prior litigation like back in the mid-'90s that might give rise to a potential statute of limitations defense. So we went to all of our unpaid plaintiffs, talked to them individually, I did it myself, and to make sure, you know, they weren't involved in any prior asbestos litigation, they had not some other attorney that had represented them in an asbestos case that might give rise to a statute of limitations defense.

And so we then supplied the railroad with affidavits on all of these remaining plaintiffs, and I've got one here if the court would like to look at it, it's very short, which basically says, I, John Doe, Social Security number, whatever date of birth hereby state under oath the following: I have never been a plaintiff or a claimant in any asbestos suit other than Allen v. Illinois Central Railroad in the Circuit Court of Jefferson County, Mississippi and Moore v. Garlock, Inc., in the Circuit Court of Smith County, Mississippi. And I'll readily admit that the two lawsuits that he's talking about, the Acuff and the McNeil lawsuit were not put in here. It was totally inadvertent. It was my fault.

None of these plaintiffs were trying to withhold any information. They didn't know, you know. They just know that they weren't in prior litigation.

Furthermore, the fact that they may be in Acuff or McNeil has no bearing on the issues before the court on these unpaid plaintiffs because the only issue that could possibly be before the court would be a potential statute of limitations defense. These cases were filed after Allen and Eakins. There's no

way in the world that they could give rise to a statute of limitations defense. The affidavits are inaccurate, and I apologize to the court and to these attorneys for that. It's my fault, but I want the court and these attorneys to know that we were bending over backwards to try to establish to Illinois Central and these attorneys that these unpaid plaintiffs had not been involved in prior asbestos litigation, and I will—

THE COURT: The import of the prior litigation, counsel, is notice to the plaintiff of a claim; is that correct?

MR. BECKHAM: Excuse me?

THE COURT: The import of the prior litigation would be because it would have noticed the plaintiff of a condition and began the statute of limitations to run; is that correct?

MR. BECKHAM: That's one of the reasons, Your Honor.

THE COURT: What would be the other reason?

MR. BECKHAM: The other reason we're interested in finding about prior litigation is that earlier litigation also may have associated with it a release which releases us and all other parties in the world.

Thirdly, any other litigation, Your Honor, would also give us notice of other defendants whom may have exposed these plaintiffs to asbestos and thus give rise to an indemnification claim or a contribution claim by us to recover whatever money, through settlement or otherwise, that we may be inclined to pay, but if the question is how are we prejudiced by their failing to know this, yes, the statute of limitations is one.

Now, they stand up today and say, well, there's not any prior cases and we would have told you. How in the world given the fact we now have 50 something false affidavits can we rely on that assertion? We would have to research every courthouse in the United States of America.

THE COURT: I can't answer that for you, counsel.

MR. BECKHAM: We've only been able to research some of them at this point. I would also like to address, Your Honor, if I could, counsel's assertion that this was mere inadvertence or that they overlooked these two lawsuits. We have filed in the court—and we have sent the court a timeline. Your Honor, the McNeil, Dresser case, one of the cases that they filed on September 10th, 2002, within the next two weeks after filing McNeil v. Dresser that we found on our own through our investigation here recently, within the next two weeks, they filed seven Pulmonary Questionnaires under the settlement agreement by plaintiffs in Robert Allen that were false.

Over the next 11 months after the filing of McNeil v. Dresser, over 150 sworn Pulmonary Questionnaires were filed by people who were plaintiffs in Dresser and they didn't disclose it. Then the next case is filed Acuff v. American Optical in Jones County. This is another case that we just recently discovered on August 27th, 2003. Within 90 days after filing that lawsuit, three more false Pulmonary Questionnaires are filed by plaintiffs who were plaintiffs in both the Dresser case and Acuff.

And then, Your Honor, over the next five months, over 50 plaintiffs in these two lawsuits, Eakins and Robert Allen, submit these affidavits which are false. Most of these plaintiffs were not just plaintiffs in Dresser, but were plaintiffs in both Dresser and the Acuff lawsuit.

A couple of these affidavits, Your Honor, are particularly notable in terms of their assertion that this was somehow inadvertent. The court will note that the first of the non-disclosed lawsuits is styled Charlie McNeil v. Dresser Industries. Charlie McNeil, he's the first named plaintiff in that lawsuit. He signs an affidavit failing to disclose that lawsuit.

Phillip Acuff is the lead—the named lead plaintiff in Jones County. He signs an affidavit failing to disclose that lawsuit.

Your Honor, we also submitted in that timeline other discovery responses that were filed in other cases: In the Irby case in Smith County; in the Burton case in Jefferson County. The only reason we burdened this court with those filings in those other cases is to demonstrate to the Court that this was not and could not be inadvertence. Over a period of two years since the filing of Dresser, there have been over 200 occasions wherein plaintiffs or attorneys should have provided this information in truthfully answering discovery but did not do so, and that's why we believe these cases should be dismissed.

MR. BROCK: Judge, our settlement agreement in Allen and Eakins provide the railroad with three potential defenses: Statute of limitations that the plaintiffs was never an employee of the railroad, and there's one more, and it escapes me right now, but I'll think of it in a second. But in filling out these Pulmonary Questionnaires, there is a question about, you know, any other asbestos litigation, and we answered that and we identified whatever lawsuit they're in like Moore, that's the primary asbestos lawsuit that we have for these gentlemen. Acuff and McNeil were cases filed regarding a settlement procedure and there's been no activity in the case. It was just a filing. One of them I don't think the defendant answered; they told us they weren't going to answer, but a lawsuit had to be filed. And so they haven't been active lawsuits, and in spite of what Mr. Beckham says, the omission from the affidavit was inadvertent and it was not intentional. It would benefit us in no way to, you know, to omit it. There's no reason for us to omit it. It gives them no defense to have it on there.

And as far as what he's saying about knowing about other potential parties, these cases are settled. There's not going to be any indemnification from this. And they have the informa-

tion now. If they want to go out and seek some kind of case against these companies, they can do so, but there's absolutely no prejudice. This was an inadvertent omission on my part, and I apologize to the court. Perhaps it was done—perhaps the affidavits were done too hastily. We were really trying to bend over backwards to get information to the railroad because we went through a period of time last year and the first part of this year where the railroad attorneys would not communicate with us at all about these cases. We would call and ask, you know, "What do you need on these guys? What's missing? Why can't we get these people paid?" And the lawyers would say, "We've been instructed not to communicate with you. We can't tell you." They wouldn't tell us. And so we really and truly have bent over backwards trying to provide information to the railroad. I apologize again that these two lawsuits were omitted from the affidavits, but I will state again to the court and these attorneys, it makes absolutely no difference to the issues that are before the court, and to dismiss these plaintiffs would be a very severe sanction for something that's not even relevant.

MR. BECKHAM: Briefly, Your Honor, I just would like to point and ask the court to take a look at the case we cited in our response, Pierce v. Heritage Properties. It talks about this idea that the lying plaintiff in the Pierce case put forward to the court that somehow the defendant has to demonstrate prejudice. Prejudice is not an issue here. It's the sanctity and dignity of the court.

Finally we've already discussed and put in the record how we've been prejudiced by this, and we would ask the court to dismiss the case—dismiss these cases. If the court does not dismiss these cases, we believe that we've already set forth in our responses—we believe we've already set forth in the responses and the documents that are on file with the court the other reasons, Your Honor, why particular claims

should not be paid for particular reasons. Including a number of that—

THE COURT: I'm going to get into that. I'm dealing with this issue alone. I don't think that the—I believe you, counsel, that these things were omitted by inadvertence. I will suggest to you that when you're dealing with something that's—I mean, if we were talking about a simple letter, you inadvertently left something out of a letter to the Illinois Central or something to that effect, that's one thing, but when you're signing an affidavit or having people sign affidavits, if they're swearing to things that are inadvertently wrong, that can have serious consequences. I mean, an affidavit is something that you need to make sure is correct before you allow the plaintiffs or whoever to sign it. In any event, the errors have been discovered. I don't think there's any prejudice.

The agreement that we're talking about I have not seen, but apparently it does not contain any provision for disclosure. I don't consider this to be such bad faith or material breach of any agreement since it wasn't in there that it would warrant a sanction of dismissal for the plaintiffs, so I'm going to overrule on that.

MR. BECKHAM: May I make one statement for the record?

THE COURT: Not about that.

MR. BECKHAM: The only thing I was going to say, the Pulmonary Questionnaires that were a part of the settlement agreement asks about other cases.

THE COURT: Now, prior releases, on August 2nd, I believe I stated I had previously ruled that the hearing loss release did not bar the claims for asbestos-related injuries. However, I did allow you to brief the issues and assured you that I would review it again which I have done.

On the issue of the other releases, I believe I told y'all that y'all could also brief that, but if they were identical to the hearing loss releases, I'll probably rule the same as I had on both cases. I have reviewed all these things, and it appears that I did not see anything that would change my prior ruling as to these cases.

The Milton McDaniel, Phil Acuff, C. H. Cobb, Charles Brown, William Johnston, Johnny Mitchell, William Carlisle, Clythus Mason, Dan Jones, York Sit, Charles Warren, Lamar Clark, Milton McDaniel, James Carpenter, I don't believe—my earlier ruling would also apply in this situation. After reviewing all relevant releases and reviewing the body of law on this subject, the court finds at follows: In Callen v. Pennsylvania Railroad, the U. S. Supreme Court held that the releases do not violate Section 5 of the FELA. The court held that a release is not a device to exempt from liability, but is a means of compromising a claimed liability, and to that extent recognizing its possibility. That court further held that where controversies exist as to whether there is liability, and if so for how much, Congress has not said that the parties may not settle their claims without litigation. Therefore, the releases in the case at bar do not violate Section 5 of FELA; however, that does not mean that they operate to release all claims that the plaintiffs may have against their employer.

The defendants rely on Loyal v. Norfolk Southern Corporation, a Georgia Court of Appeals case for the proposition that the releases at issue cover all claims past and present. The court feels that Babbitt, Wicker and Damron v. Norfolk and Western Railway Company, all federal cases, are more persuasive authorities on this issue.

In Babbitt, the 6th Circuit held that a release could not serve as a bar to employee's claims under FELA unless it was clearly executed as a settlement for a particular injury. The court in Babbitt went on to say that in order for a release to be valid under FELA, it must reflect a bargained-for settlement

of known claim for a specific injury as contrasted with an attempt to extinguish potential future claims employees might have arising from injuries known or unknown by him.

Similarly, in Wicker, the 3rd Circuit held invalid blanket releases which attempt to cover all liability by reciting a series of generic hazards which the plaintiff may have been exposed. That court found that those releases did not demonstrate the employees knew of the actual risks to which they were exposed and from which the employer was being released. This court has previously held that hearing loss releases does not operate to release Illinois Central from asbestos-related injury claims. The court sees no reason to change course and depart from its prior ruling on this issue.

In William Allen v. Illinois Central Railroad, Cause No. 2002-88, this court held that the plaintiffs' who executed such releases did, in fact, release pending asbestos exposure claims but since the claims were filed after the releases, they were not pending at the time the plaintiff signed them; therefore, the release did not operate to keep them from recovering under the settlement agreement entered into by the parties. In light of the foregoing considerations of fact and law, the court finds that releases executed by the aforementioned plaintiffs does not bar them from participation in the settlement agreement.

In regard to James Expose, I believe, that deals with carpal tunnel, I feel that he should be dismissed from the settlement because his carpal tunnel release was signed on May the 10th, 2004, some four years after the present case was filed. Therefore, his claim was pending, and it was known at the time of the release.

The pertinent part of the carpal tunnel release reads as follows: "The undersigned does fully, completely and forever release, discharge and acquit the Illinois Railroad Company." It goes on to say, "of and from any and all claims, losses,

damages and injuries and/or other conditions including surgeries and effects of surgeries directly or indirectly caused by or resulting from the undersigned's years of service with Releasees, when the undersigned, while working as an employee of Illinois Central Railroad Company. . . . It is understood and agreed that this settlement agreement and release is intended to release any and all claims for any and all injuries or conditions suffered or alleged to have been suffered as a result of the above-referenced employment for Releasees."

It goes on to state, "It's further understood and agreed that this is a full and complete release from any and all claims which are known or reasonably could have been known and the damages resulting therefrom, whether for personal injuries or otherwise." For that reason I feel that particular claim and that particular plaintiff should be dismissed from the settlement.

As to the statute of limitations ruling based on medical records, on August 2nd I held that you could do more discovery for 30 days until September 2nd in order for the court to have more evidence upon which to make a call. The defendant argued that the settlement procedure in both cases reserved Illinois Central Railroad the right to reject settlement of claims for which the statute of limitations has run. The FELA statute of limitations is three years; is that right?

They argue that the following plaintiffs should be dismissed because they fall outside of the applicable limitation period: In Eakins, Mr. Hubert Deer and Willie Mobley, and in Allen, Kelly Robinson. Pursuant to the FELA's applicable statute of limitations involving occupational diseases is three years from the date that plaintiff knew or should have known of his alleged medical condition.

In Urie v. Thompson, the U. S. Supreme Court held that the statute of limitations under FELA begins to run when the

plaintiff should have or could have discovered the injury. In Williams v. Southern Pacific Transport Company, the federal court for the Southern District of Mississippi held in the case of an occupational disease where symptoms do not immediately manifest themselves, the cause of action does not accrue until the plaintiff is aware or should be aware of his—or accrues when the first injury manifests itself to the plaintiff. The plaintiff need not know the cause of the injury or receive formal medical diagnosis for the action to accrue. There is no requirement that the injury reach its maximum severity before the cause of action is deemed to accrue.

As to Hubert Deer, the court finds that the statute of limitations has not run despite the fact that his lawyers told him that he may have asbestos because he went to the doctor and was not diagnosed with asbestosis outside of the limitations period. Therefore, the court finds that it is not reasonable to expect that he should have reasonably known of the accrual of his cause of action. He was diligent in going to the doctor regularly. He was not put on notice of his disease because he was not diagnosed with it until April 2nd, 1998, well within the limitations period.

With respect to Willie Mobley, I'll hold the same as above. The limitation period had not run. He went to the doctor but was not diagnosed with asbestosis outside of the limitations period, so there's no reason to think he should have known of the accrual of his action.

With respect to Kelly Robinson, I believe that this claim should be barred by the statute of limitations and dismissed because he was diagnosed with pulmonary fibrosis in 1989. The diagnosis at least put the plaintiff on notice of the accrual of his cause of action and the statute of limitations ran in 1992.

With respect to Roy Campbell, I also believe that this claim should be dismissed because of the FELA statute of

limitations. The defendant states that Mr. Campbell died on July 3rd, 1995. The Allen case at issue was not filed until June 26th, 2000. This would be outside of the FELA's three year statute of limitations. This is a case—seems to me that Mr. Campbell should be dismissed due to the applicable statute of limitations.

I believe you had mentioned something about medical reasons, negative chest x-rays or CAT scans subsequent to the diagnosis of asbestosis disease. On August 2nd I held that you can do more discovery for 30 days until September 2nd in order for the court to have more evidence to make a call on this. The sole issue relating to this is to be decided basically from the discovery was the competence of the physicians in diagnosing the asbestos-related disease.

I believe the defendant claims this applies to Charles McNeil, Lester Ray Warren and Willie Woodberry. I had given you more time to depose the secondary diagnosing physician, but I have not seen anything on these depositions. So without seeing something on the depositions, it appears that I should allow them to remain in the settlement because the secondary diagnosis was not made by a B reader, someone who has expertise in the matter.

Relating to the missing documentation, I believe on August 2nd—we're talking about these Railroad Retirement Board printouts; is that correct? I believe on August 2nd I held that the documents needed to be provided to the defendants but I gave you more time because you were having trouble getting the documents; is that right? And I believe that the only plaintiff in dispute here is Bernard Banks; is that correct?

MR. BAILEY: So far as the railroad retirement board, yes, sir.

THE COURT: Well, I think that will give you sufficient time, counsel.

MR. BROCK: I think we may be dealing with a situation where in light of the time period he worked, which was, I think, in the '40s for not a very long period of time, that they just don't have any records.

THE COURT: Well, there's not any way you can give it to them then.

MR. BAILEY: Your Honor, does that mean that Mr. Banks is going to be dismissed from the settlement?

THE COURT: Yes, sir. This situation here, the Illinois Central claims that the Pulmonary Questionnaires were submitted too late for, I believe, for seven folks; is that right?

MR. BAILEY: Yes, sir, Your Honor. There were seven folks who did not submit their pulmonary questionnaire by the time the plaintiffs agreed to in the March 29th supplemental—

THE COURT: Well, to dismiss these claims would be, in effect, a sanction. I mean, they were—they were eventually submitted; is that correct?

You did get them?

MR. BAILEY: They were 16 days late, Your Honor. And the agreement that plaintiffs' counsel entered into on behalf of the plaintiffs provided simply we will either provide you by June 1st, 2004, with a Pulmonary Questionnaire or we will dismiss these cases. It's—

MR. GUY: Your Honor, they probably breached that agreement also. They just didn't conform to that agreement.

THE COURT: To dismiss those claims would be a sanction, and, counsel, frankly I see things every day—lawyers have an awful hard job complying with schedules and doing the things that they're supposed to do, and I'm certainly not condoning this. If you say you're supposed to have something to them on a certain day, you need to get it there, but by the same token, I feel like ruling that a

questionnaire card that's 16 days late to dismiss their client would be to effect sanction a party for the tardiness on the part of their lawyer, and I'm not comfortable doing that. I don't feel that that sanction is appropriate in this case.

MR. BROCK: Judge, I think that addresses all of the issues. There are—I do want to ask the court about one thing that we talked about on August 2nd, but those seven we've submitted all that information to the railroad, and I don't know if it would be premature to talk about a time to try to come back to the court or maybe give the railroad a certain time to tell us whether they're going to pay those people or not, and if they're not, why not, then we can come back to the court on those seven.

We also have a gentleman that we talked about on August 2nd that the court ruled that the railroad should pay the claim of Larry McWilliams. That was the gentlemen who withdrew his claims for asbestosis and resubmitted for lung cancer, and so I guess we need to prepare an order to reflect the court's ruling, and I can just put Mr. McWilliams in with the rest of these.

MR. BAILEY: We offered in our briefs further argument about Mr. McWilliams. I don't think there's any reason for us to belabor it any further. The Court has already ruled. If our briefs didn't sway you to change your ruling, he needs to be included.

Your Honor, there are—Mr. Brock mentioned the seven—you mentioned about the late Pulmonary Questionnaires. There are actually ten plaintiffs total that we have not dealt with either in these briefs or—and there were three that were timely on as far as the June 1st deadline but we just got them shortly before that deadline, so there's actually ten out of the total between the two case or 35 or whatever it is that we haven't even asked Your Honor to rule on them because we're still obtaining medical records to see if we have statute of limitation defenses, medical defenses, that sort of thing.

MR. BROCK: The only thing I would ask, judge, is that we have some kind of reasonable time frame for this because three of the questionnaires were submitted in May, and then seven in June.

THE COURT: Let me ask you this: I would hope that y'all are still not entering into settlement agreements whereby the court has to administrate settlement funds. I hope that's over.

MR. BROCK: Yes, sir. And I would add, too, that we're talking like there's ten of these people. There's actually nine because Mr. Campbell was one of those ten, so that's going to be nine.

THE COURT: Okay. Thank you.

* * * *

CERTIFICATE OF COURT REPORTER

I, Theresa S. Lumley, Official Court Reporter and Notary Public in and for the Twenty-Second Circuit District, State of Mississippi, do hereby certify that to the best of my skill and ability I have reported the proceedings had and done in the motion of Allen and Eakins v. Illinois Central Railroad, being Cause Number 2000-100 and 2001-65 on the docket of the Circuit Court of Jefferson County, Mississippi, and that the above and foregoing 30 pages contain a true, full and correct transcript of my stenographic notes and tape taken in said proceedings.

I do further certify that my certificate annexed hereto applies only to the original and certified transcript and electronic disks. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or direction.

This the 27th day of October 2004.

_____

Theresa S. Lumley

APPENDIX E

45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.